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IN THE SUPERIOR COURT FOR THE

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS ASSOCIATION, Plaintiff, v. CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10 inclusive, Defendants. AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS	Case No. 1-12-CV-225926 [*Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV227864]* **POST TRIAL BRIEF OF DEFENDANT/CROSS-PLAINTIFF CITY OF SAN JOSE AND DEFENDANT DEBRA FIGONE, IN HER OFFICIAL CAPACITY** Dept.: 2 Judge: Hon. Patricia M. Lucas Complaint Filed: June 6, 2012 Trial Date: July 22, 2013

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I. INTRODUCTION

This post-trial brief outlines the trial evidence and law governing plaintiffs' vested rights challenge to the Sustainable Retirement Benefits and Compensation Act, adopted by the City's voters as "Measure B" in the June 2012 election.[1] (Exh. 5000 [Measure B].)

Plaintiffs did not meet their burden of proof at trial. They failed to overcome the presumption that Measure B is constitutional and lawful. The Court should enter judgment against plaintiffs on all causes of action and a declaratory judgment in favor of the City finding that each section of Measure B is lawful.

II. PROCEDURAL BACKGROUND

On June 5, 2012, the City's voters passed Measure B by a 70% margin. Measure B added Article XV-A, a pension reform measure, to the San Jose City Charter. Six sets of plaintiffs filed suit challenging sections of Measure B, and the City cross-complained for declaratory relief. All cases were consolidated for trial.[2]

As a group, plaintiffs seek declaratory and injunctive and/or mandamus relief prohibiting the City from applying twelve separate sections of Measure B based on state constitutional claims of contractual impairment, violation of due process, takings, right to petition, equitable estoppel, and other claims. The City seeks declaratory relief as to the validity of certain sections of Measure

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[1] A true and correct copy of Measure B [Exh. 5000] is attached as Exhibit A for the Court's convenience.

[2] The six sets of plaintiffs are: (1) the San Jose Police Officers Association ("SJPOA"), which represents employees who are members of the 1961 San Jose Police and Fire Department Retirement Plan ("Police and Fire Plan"); (2) the American Federation of State, County, and Municipal Employees, Local 101 ("AFSCME"), which represents employees who are members of the 1975 Federated City Employees' Retirement Plan ("Federated Plan"); (3) Robert Sapien, Mary Kathleen McCarthy, Thanh Ho, Randy Sekany, and Ken Heredia, who are active and retired members of the Police and Fire Plan (collectively, "Sapien Plaintiffs"); (4) Teresa Harris, Jon Reger, and Moses Serrano, who are active and retired members of the Federated Plan (collectively, "Harris Plaintiffs"); (5) John Mukhar, Dale Dapp, James Atkins, William Buffington, and Kirk Pennington, who are active and retired members of the Federated Plan (collectively, "Mukhar Plaintiffs"); and (6) the San Jose Retired Employees Association("Retiree Plaintiffs").

B under federal constitutional provisions.[3]

III. TRIAL

Trial occurred over five days, from July 22, 2013, to July 26, 2013. The parties called a total of 13 witnesses. At close of trial, the Court ordered post-trial briefs and proposed statements of decision to be filed by September 10, 2013. The Court also set October 10, 2013, as a potential day for the Court to ask questions of the parties, at the discretion of the Court.

A. Trial Witnesses.

The SJPOA called four witnesses: Mike Fehr, Pete Salvi and John Robb, current and former POA members, who testified concerning the City's provision of a subsidy in the amount of the premium for the "lowest cost" plan offered City employees; and Bob Leininger, a Federated plan retiree, who testified that he received a retirement system newsletter in the mail.

AFSCME called three witnesses: Charles Allen, an AFSCME union representative, who testified concerning union negotiations over contributions for retiree healthcare costs; Margaret Martinez, a Federated retiree, who testified concerning the "lowest cost plan"; and Dan Doonan, an AFSCME employee called as a "labor economist," who testified concerning cost of living statistics and other financial topics.

The Sapien plaintiffs called only one witness: actuary Thomas Lowman, a long time union-side expert witness, who testified about general actuarial principals of government defined benefit plans.

The Retired Employees Association did not call any witnesses.

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[3] Previously, the Court ruled as follows on motions brought by the parties. On January 21, 2013, the Court granted without leave to amend the City's motion for judgment on the pleadings as to the SJPOA's seventh cause of action for violation of the Meyers-Milias-Brown Act ("MMBA"). On March 15, 2013, the Court denied plaintiffs' motion for a preliminary injunction. On April 30, 2013, the Court sustained without leave to amend the defendants' demurrer to AFSCME's seventh cause of action for illegal ultra vires tax, fee or assessment. On June 21, 2013, the Court denied the City's motion for summary adjudication brought in connection with three sections of Measure B. On July 2, 2013, the City and Retired Employees Association plaintiffs entered into a stipulation under which the plaintiffs dismissed their estoppel claim without prejudice and filed an amended complaint.

The City called four witnesses: Sharon Erickson, City Auditor, who testified concerning her work related to auditing the sustainability of the City's pension system and the need for reform in the disability retirement system; Debra Figone, City Manager, who testified concerning City budget shortfalls and service reductions related to increased retirement costs; Alex Gurza, Deputy City Manager and head of the Office of Employee Relations, who testified concerning City and union labor negotiations over employee pension and retiree health contribution rates, labor contracts and City retirement benefits; and John Bartel, an outside actuarial expert who testified concerning the nature of the SRBR.

B. Trial Exhibits.

The Court admitted numerous exhibits at trial. At trial, the parties entered into a written stipulation, in which they agreed to the admission of additional exhibits. After trial, AFSCME and the City entered into another stipulation, dated August 13, 2013, for admission of the remaining exhibits, and the other parties subsequently withdrew their objections to those exhibits.

C. Stipulations.

The parties entered into the following substantive stipulations at trial:

First, all parties agreed that Measure B is severable and that the court has the authority to adjudicate its legality section by section. (Tr. p. 321-22.)

Second, no one contends that Measure B is illegal as to future employees. (Tr. p. 43.) Therefore, at a minimum, the Court must declare in this case that Measure B is lawful as to new employees.

Third, during trial, AFSCME dismissed with prejudice its second cause of action for bill of attainder. (Tr. p. 392-93.) Thus, along with the claims dismissed prior to trial, the following causes of action in the various complaints have been dismissed, and are no longer at issue:

- Bill of Attainder (AFSCME Complaint, second cause of action¶)
- Meyers-Milias-Brown Act (SJPOA Complaint, seventh cause of action¶)
- Ultra vires tax (AFSCME Complaint, seventh cause of action¶)
- Estoppel Claims by Retirees (See Retirees Amended Complaint¶)

D. Measure B Sections Subject to Trial Adjudication.

The parties submitted a stipulated Summary of Operative Pleadings, Causes of Action and Measure B Sections to be Adjudicated at Trial, endorsed filed dated August 6, 2013. A true and correct copy of this Summary is attached for the Court's convenience as Exhibit B.

IV. LEGAL ARGUMENT

A. Plaintiffs Have the Burden of Proof on All Claims.

In contrast to the prior summary adjudication motion, Plaintiffs have the burden of proof. Plaintiffs must overcome the presumption that Measure B is legal. "All presumptions favor the validity of a statute. The court may not declare it invalid unless it is clearly so." *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1022 (1995).

With respect to numerous Measure B sections, plaintiffs failed to proffer any testimony or other evidence. In those instances, plaintiffs are presumably making a facial challenge. Thus, plaintiffs must "demonstrate that [Measure B's] provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions." *Tobe* at p. 1084, quoting *Pacific Legal Foundation v. Brown*, 29 Cal.3d 168, 180-81 (1981).

In the context of this vested rights challenge, the Supreme Court's decision in *REAOC* is controlling. *Retired Employees Association of Orange County, Inc., v. County of Orange (REAOC)*, 52 Cal. 4th 1171 (2011). To meet the initial threshold requirement of establishing an entitlement to the particular property or contractual right at issue, it is plaintiffs' "heavy burden" to demonstrate "the legislative body's intent to create vested rights." *Id. at* 1190. *Vielehr v. State of California*, 104 Cal. App.3d 392, 397 (1980) (emphasizing plaintiff's burden to show a "retirement right").

To do so, plaintiffs have the burden of overcoming the presumption "that a statutory scheme is not intended to create private contractual or vested rights." *REAOC,* 52 Cal. 4th at 1186. To overcome this presumption, plaintiffs must prove that the "statutory language or circumstances … 'clearly' … evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body]." *Id.* at 1186-87. "[T]o construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit

drastically the essential powers of a legislative body." *Id.*

Although there are certain differences among the various causes of action brought by the plaintiffs, there is one common element plaintiffs must prove: each cause of action requires plaintiffs to prove an enforceable "commitment" or "promise" that is somehow violated by the Measure B sections at issue in this case. For the contract impairment claims, the inquiry focuses on "whether a contract exists *as to the specific terms allegedly at issue*." *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System,* 568 F.3d 725, 736-37 (9th Cir. 2009) (emphasis added).); See also *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal.App.4th 534, 559 fn.15 (2001) (Californias' courts "do not differentiate between the federal and state contract clauses in their analysis..."), citing *Calfarm Ins. Co. v. Deukmejian,* 48 Cal. 3d 805, 826-31 (1989).

This same inquiry applies to the SJPOA's breach of contract claim. See *Retired Employees' Association of Orange County v. County of Orange*, 632 F.Supp.2d 983, 987 (C.D. Cal. 2009) ("Because the County has no contractual obligation to continue providing the pooling benefit, Plaintiff's claims for breach of contract and impairment of contract fail").

Similarly, for the due process and "unlawful takings" claims, the inquiry is whether there is some constitutionally protected property interest. *Id.* at 740; *City of San Diego v. Haas*, 207 Cal.App.4th 472, 498 (2012). And, promissory estoppel claims require evidence of a clear and unambiguous promise. *Retired Employees' Ass'n*, 632 F.Supp.2d at 987 ("Plaintiffs' claim for promissory estoppel also fails, since the retirees could not have reasonably relied on a "clear promise" from the Board to continue the pooling benefit throughout their lifetimes"). As set forth below, Plaintiffs failed to meet their burden of proof on their challenges to any section of Measure B.

Section 1504

B. Section 1504 – Reservation of Voter Authority.

Section 1504-A reserves voter authority to "consider any change in matters related to pension and other post-employment benefits," and requires voter approval for any increases to pension or retiree healthcare benefits, other than Tier 2 benefit plans. (Measure B, Section 1504-A.)

Only the Retired Employees Association challenges this section, claiming that it violates the vested right to have the City Council be able to grant increases in retirement benefits. This question is purely a facial legal challenge, as plaintiffs did not present any evidence on it at trial.

Plaintiffs did not and cannot prove their claim. Article XI, section 5(b)(4) of the California Constitution grants "plenary authority" for a city charter "to provide therein or by amendment thereto" for the ''compensation" of city officers and employees.[4] Given this plenary authority, a city charter may require electoral approval of the compensation of city officers and employees. *See Munoz v. City of San Diego*, 37 Cal.App.3d 1, 4 (1974) (upholding city charter provision that required council member salaries to be decided by the electorate "because it has been constitutionally committed to a political department of government, i.e., the electorate, and not to the courts"); *Butterworth v. Boyd*, 12 Cal. 3d 140, 147 (1938) (charter city home rule authority includes "providing for the compensation of a municipal officer or employee"). Retirement benefits relate directly to compensation. *Downey v. Board of Administration*, 47 Cal.App.3d 621, 629 (1975) ("It is clear that provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution"). Therefore, Article XI, section 5(b) of the

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[4] Article XI, Section 5(b) states: "It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) *plenary authority is hereby granted*, subject only to the restrictions of this article, *to provide therein or by amendment thereto*, the manner in which, the method by which, the times at which, and the terms for which the several *municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation*, and for the number of deputies, clerks and other employees that each shall have, and *for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.*" [Emphasis added.]

California Constitution permits a city charter to require that the voters approve "by amendment" any increases in employee retirement benefits.

In their pretrial brief, the Retired Employees Association argued that Section 1504-A "added an additional obstacle that did not previously exist . . . by requiring voter approval" (SJREA Pretrial Br. at p. 19), but cited no authority holding that a change to voter approval violates any vested right.

The contention that there is some vested right preventing the voters from having the ability to control retirement benefits is frivolous. San Jose is a charter city. The Charter is the constitution of the City. Under the California Constitution the voters, who enact the Charter, have plenary authority over municipal affairs which include employee compensation and retirement benefits.[5]

Finally, plaintiffs cannot prove the necessary ripeness required before this issue can be adjudicated. *San Bernardino Public Employees Ass'n v. City of Fontana*, 67 Cal.App.4th 1215, 1226-27 (1998) (where city had not made a concrete proposal concerning retirement benefits, matter was not ripe); *Pacific Legal Foundation v. California Coastal Commission*, 33 Cal.3d 158, 170, 173 (1982) (dispute must be "concrete"). Plaintiffs have not, and cannot, point to any particular proposal that the City has asserted must be presented to the voters. Here, plaintiffs are asking the court to "speculate on the resolution of hypothetical situations" that may or may not occur. *Id.*[6]

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[5] Notably, similar provisions are found in other City Charters, including San Diego and San Francisco. See Exh. 6100, City of San Diego City Charter, Section 143.1(d) ("The requirement for voter approval of retirement system benefit increases shall become operative on January 1, 2007, for all proposed increases in retirement system benefits tentatively agreed upon by the City on or after that date."); *United Public Employees v. City and County of San Francisco*, 190 Cal. App.3d 419, 422-23 (1987) (charter provision required "voter approval of any 'addition, deletion or modification' of city employee benefits").

[6] The Retirees have argued that this section is ripe for review because the City included it in its federal declaratory relief action, filed in June of 2012. At that time, the City was aware that this section would be challenged by plaintiffs. By filing its declaratory relief action, the City did not waive any ripeness argument.

Section 1506-A

C. Section 1506-A: Increased Contributions - Current Employees

Section 1506-A seeks to reduce the City's yearly cost of pension plan unfunded liabilities by requiring employees to share in the cost through increased pension contributions. Plaintiffs offered no witnesses regarding this section. The City proffered testimony on this issue primarily through Alex Gurza.

Section 1506-A requires increased employee contributions toward unfunded liabilities, not to exceed 4% of pensionable pay per year up to a maximum of 16%, or 50% of the yearly cost of pension plan unfunded liabilities, whichever is less. (Measure B, §1506-A.)[7]

The evidence at trial confirmed that in drafting Measure B, the City proposed increased employee contributions as the preferred alternative to straight pay reductions, as it is more beneficial to employees than decreased pay. Section 1506-A(e) provides that the additional contributions are to be treated the same as "other employee contributions," meaning they will be "made on a pre-tax basis through payroll deductions pursuant to applicable Internal Revenue Code Sections," and they will be "subject to withdrawal, return and redeposit" as are "any other employee contributions." (Section 1506-A.)

Plaintiffs cannot prevail in their challenge to this section for numerous reasons. First, the Charter's reservation of rights clauses clearly and unequivocally reserve the City's right to make adjustments to the retirement plans, subject only to certain minimums. Second, regulating compensation is a municipal affair, and the City has the right to increase or reduce compensation under the California Constitution. Here, all parties treated retirement contributions and compensation as essentially interchangeable and, indeed, the parties negotiated freely over the issue of pension contributions. The evidence at trial showed that *no one, including the attorneys at trial who had openly advocated for increased contributions, believed that employee*

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[7] If employees cannot be required to make additional pension contributions, Section 1514-A requires that employee wages be reduced in equivalent amounts. (*Id.*, §1514-A.) Employees who do not wish to pay the cost of the existing plan have the option of selecting an alternative, lower cost, retirement plan. (*Id.*, §1507-A.) The City's motion for summary adjudication addressed Section 1506-A, but not the alternative wage reduction contained in Section 1514-A.

contributions toward the retirement plans' unfunded liabilities would be somehow infringed as a vested right.

The Court must conclude here that the City has the right to control employee compensation, as that right is embedded in the California Constitution and has been confirmed time and time again by the Supreme Court. (Cal. Const., Art. XI, Section 5(6).) To the extent the Court concludes that current case law precludes a reduction in compensation caused by increased retirement contributions (which was shown at trial to be more favorable to employees), the cases relied upon deserve fresh scrutiny because they are illogical.

1. The Charter's Reservation of Rights Clauses Expressly Contemplate Adjustments to the Plans, Subject Only to the Charter Minimum

The City Charter contains two reservation of rights clauses that permit the City to "amend or otherwise change" its retirement plans and to "repeal or amend" any retirement systems. (Exh. 5216, Charter sections 1500, 1503.) These Charter provisions trump the City's Municipal Code provisions on retirement and preclude the creation of the vested rights claimed in this case.

The City is mindful of the Court's ruling on the City's motion for summary adjudication, when the City had the burden of proof. The City asks the Court to revisit the issue in this post-trial context, where plaintiffs have the burden of proof.

For the sake of convenience, the City has compiled key exhibits at Exhibit C, including the Charter and ballot arguments when the reservation of rights clause was first introduced.

Key Cases Supporting the City's Position: Courts recognize the power of reservation of rights clauses to preclude the establishment of vested rights to retirement benefits. *See Walsh v. Board of Administration,* 4 Cal.App.4th 682, 700 (1992) ("The modification of a retirement plan pursuant to a reservation of the power to do so is consistent with the terms of any contract extended by the plan and does not violate the contract clause of the federal constitution."). A reservation of rights clause "is explicit evidence of legislative intent regarding the question of vested retiree health benefits" that "falls squarely" against the finding of vested rights. *Retired Employees' Association of Orange County v. County of Orange* (Case No. SACV 07-1301 AG) 2012 U.S. Dist. LEXIS 146637, *29 (C.D. Cal. August 13, 2012); *see also Teachers' Retirement*

Board v. Genest, 154 Cal.App.4th 1012, 1021-22 (2007) (acknowledging the following reservation of rights clause [Cal. Ed. Code § 22954(d)] before its repeal: "[T]he Legislature reserves the right to reduce or terminate the state's contributions to the [SMBA] in the Teachers' Retirement Fund provided by this section and to reduce or terminate the distributions required by Section 24415."); *International Ass'n of Firefighters v. City of San Diego*, 34 Cal.3d 292, 299 (1983) ("the Board shall . . . make such revisions in rates of contributions of members as it deems necessary to provide the benefits"); *National R. Passenger Corp. v. A.T.&S.F.R. Co.,* 470 U.S. 451, 466 (1985) ("Indeed, lest there be any doubt in these cases about Congress' will, Congress 'expressly reserved' its right to 'repeal, alter or amend' the Act at any time (citation omitted). This is hardly the language of contract."); *Flemming v. Nestor,* 363 U.S. 603, 610-11 (1960) ("It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it '*the right to alter, amend, or repeal any provision* of the Act."[8]).

Plaintiffs' Cases are Inapposite: AFSCME, the SJPOA and the Retired Employees Association have cited *Air Cal, Inc. v. San Francisco*, 638 F.supp. 659 (N.D. Cal. 1986), *Cont'l Ill. Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 692 (9th Cir. 1983), and *Southern Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885 (9th Cir. 2003), for the proposition that reservation of rights clauses generally are not enforceable. But those cases do not apply here. They involve negotiated contracts between public and private entities, subject to general clauses reserving the

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[8] The SJPOA and AFSCME have contended that these federal cases are less protective of public employee pensions than California cases. But *REAOC* did not distance itself from federal law; it relied on federal law in articulating the standards to be applied in determining whether legislative action confers a vested right. *REAOC*, 52 Cal.4th at 1185-86 (relying on *National R. Passenger Corp. v. A.T.& S.F.R. Co.*, 470 U.S. 451 (1985) ["to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body"], at 1187 (relying on *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.14 (1977) [legislative action must "clearly . . . evince a legislative intent to create private rights of a contractual nature enforceable against the [governmental body]]"). The California Supreme Court thus confirmed the viability of federal law standards as applied to contractual impairment claims made under California state law.

public entity's "police powers." The courts simply held that the public entities' general regulatory authority could not be used to impose additional financial terms contrary to the "principal rights" negotiated and past practices under the contract. *See, e.g., Southern Cal. Gas*, supra, 336 F.3d at 892. In contrast, this case involves a reservation of rights clause that prevented a contract from forming in the first instance. This case is governed by *Walsh*, in which a legislatively enacted reservation of rights, in existence *before* contribution rates were set, *prevents* the creation of vested rights.

Other plaintiffs rely on *Legislature v. Eu*, 54 Cal.3d 492 (1991) in support of their contentions. But *Eu* held only that a reservation of rights that gave authority to the legislature did not apply to a voter initiative. *Id.* at p. 529-30. Here, Measure B was *not* a voter initiative. Rather, the legislative body, the City Council, placed Measure B on the ballot and later implemented it by ordinance.[9] The decision in *Walsh* evaluated the same reservation of rights at issue in *Eu*, and found it valid, because the legislative body made the changes to funding the pensions. *Walsh, supra,* at p. 700.

Eu is distinguishable for another reason. In *Eu*, the Court found that the voter initiative's attempt to "terminate" certain pension benefits exceeded the scope of the reservation of rights clause at issue in that case. *Id.* at p. 530. Here, the reservation of rights clause expressly reserves the authority to "amend or otherwise change" the City's retirement plans, and this is consistent with the effect of Measure B.

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[9] Measure B was *not a voter initiative*, but was placed on the ballot by City Council legislative action pursuant to its state constitutional authority. (Cal. Const., Art. XI, section 3(b).) Furthermore, pursuant to its City Charter authority, the City Council has enacted ordinances implementing Measure B into both the Federated and Police and Fire Plans. (Exh. 5300 [Ordinance No. 29174: "Under the City Council's authority pursuant to Article XV, Section 1500 of the City Charter, the provisions of Article XV-A are hereby implemented into the San Jose City Code" (amending Muni. Code § 3.28.010(F))], and Exh. 5301 [Ordinance No. 29198: "Under the City Council's authority pursuant to Article XV, Section 1500 of the City Charter, the provisions of Article XV-A are hereby implemented into the San Jose City Code" (amending Muni. Code § 3.32.010(b)].)

Plaintiffs' Municipal Code Argument: Plaintiffs have argued that because the Municipal Code previously indicated that the City would be responsible for unfunded liabilities, this is a vested obligation. In deciding the City's Motion for Summary Adjudication, under which the City had the initial burden of proof, the Court found that the Charter contained a reservation of rights but also permitted the City to enact retirement plans by ordinance, potentially creating vested rights. (Order at p. 5.) At trial, however, plaintiffs had the burden of proving that the City in fact intended to create vested rights through the Municipal Code. Plaintiffs did not meet that burden for several reasons, including because the Charter's reservation of rights cannot be nullified by ordinance:

- "We begin with the cardinal principle that the charter represents the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law." *Domar Electric, Inc. v. City of Los Angeles,* 9 Cal.4th 161, 170 (1994), citing Cal. Const., art. XI, §3(a). From this principle flow several others:
- "The provisions of the City Charter supercede all municipal laws, ordinances, rules or regulations inconsistent therewith." *Stuart v. Civil Service Comm.*, 174 Cal.App.3d 201, 206 (1985) (civil service rule in conflict with Charter was void).
- "An ordinance can no more change or limit the effect of a charter than a statute can modify or supersede a provision of the state Constitution." *Lucchesi v. City of San Jose*, 104 Cal.App.3d 323, 328 (1980) (city ordinance granting preference to city employees in hiring was in conflict with City Charter and therefore void).
- Where a charter confers on the legislative body "discretionary power" to deal with a subject, an ordinance cannot "alter or limit this power." *City and County of San Francisco v. Patterson*, 202 Cal.App.3d 95, 105 (1988) (board's charter power to sell or lease property could not be altered by ordinance); *Citizens for Responsible Behavior v. Superior Court*, 1 Cal.App.4th 1013, 1034 (1991) (city council's plenary power to address discrimination could not be limited by ordinance).
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Based on this hierarchy, plaintiffs cannot show that the City gave up legislative control over unfunded liabilities, or any other issue presented by Measure B. The San Jose Charter reserves the City's right to "amend or otherwise change" the City's retirement plans; the Charter supersedes all municipal ordinances on retirement; an ordinance cannot "change or limit" the Charter's reservation of rights; and a City Council's discretionary authority cannot be limited by ordinance.

Here, as in *International Association of Firefighters v. City of San Diego*, 34 Cal.3d 292, 300-02 (1983), the changes made by Measure B "were made pursuant to the charter and ordinances which delineate the City's retirement system and prescribe the employees' vested rights."

Plaintiffs cite cases such as *Bellus v. City of Eureka*, 69 Cal.2d 336 (1968) and *England v. City of Long Beach*, 27 Cal.2d 348 (1945), and others, for the proposition that a charter city is required to pay for unfunded liabilities absent explicit authority limiting payments to the amounts in the pension fund. But in none of these cases was there an express reservation of rights like that in the San Jose City Charter, and therefore unlike in *Walsh*, these cases did not address the reservation of rights issue. Case law cannot be cited for propositions it does not address. *Ginns v. Savage,* 61 Cal.2d 520, 524, fn. 2 (1964) ("an opinion is not authority for a proposition not therein considered"); *Security Pacific National Bank v. Wozab*, 51 Cal.3d 991, 1003-04 (1990). ["the positive authority of an opinion is coextensive only with ['its'] facts"]).

Plaintiffs' Statutory Interpretation Agreements*:* The *Sapien* plaintiffs have contended that the Charter's reservation of rights permits change only with a "reasonable comparable substitution replacement." The POA contends that the clause should be construed to permit only *increases* in benefits. But the Charter's reservation of rights is broadly worded and does not include the limitations proposed by plaintiffs.[10] Plaintiffs' theory violates principles of statutory construction

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[10] It states that, "the Council may *at any time*, or from time to time, amend or change *any* retirement plan or plans or adopt or establish a new or different plan or plans for *all or any* officers or employees." (Charter, art. XV, § 1500 (emphasis added).) Rather than use restrictive (footnote continued)

and is contrary to legislative history.

First, principles of statutory construction prohibit the addition of omitted terms. "[T]he office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. . . ." Cal. Code Civ. Proc. § 1858; *see also People v. Guzman*, 35 Cal.4th 577, 587 (2005) ("'insert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes...'") (citation omitted); *Richardson v. San Diego*, 193 Cal.App.2d 648, 651 (1961) (applying "liberal construction" to pension plan, but declining to expand pension benefits beyond the terms of the plan (citations omitted). Plaintiffs' theories involve terms not included in the Charter.

Second, based on the constitutional authority of charter cities, courts do not read limitations into a charter that are not expressly present. "Charter provisions are construed in favor of the exercise of the power over municipal affairs and 'against the existence of any limitation or restriction thereon which is not expressly stated in the charter...." *Domar Electric,* 9 Cal.4th at 171. "Thus, *'[r]estrictions on a charter city's power may not be implied.*'" *Id.* at 171, quoting *Taylor v. Crane*, 24 Cal.3d 442, 451 (1979) (emphasis added).

Third, plaintiffs' theory that the City Council could only increase benefits would render the Charter sections establishing minimum benefits unnecessary and thus mere surplusage. Plaintiffs' construction is thus contrary to settled principles of statutory construction. *See City and County of San Francisco v. Farrell,* 43 Cal. 3d 47, 54 (1982) ("an interpretation which would render terms surplusage should be avoided").

Finally, the argument that the reservation of rights clause restricts benefit changes to increases is belied by the legislative history. Section 78b contained the genesis of the current

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modifiers, the clause uses the inclusive phrase "any" repeatedly. The reservation of rights clause applicable to retirement systems existing when the 1965 Charter was adopted (the current Police and Fire Plan) is even more broad, stating that "the Council shall *at all times* have the power and right to *repeal or amend any* such retirement system or systems, and to adopt or establish a new or different plan or plans for all or any officers or employees . . . . " (Charter, art. XV, §1503.)

reservation of rights clause. The ballot argument in its favor states: "THIS AMENDMENT GIVES DISCRETIONARY POWER TO THE CITY COUNCIL! It is good government to allow the City Council to be responsible for investigating problems and deciding how to solve them. THIS AMENDMENT IS SIMPLE! Leave all the technical details to your City Council. They have a staff to assist them including a very capable City Attorney." (Exh. 5201[Emphasis in original]).

Ignoring this broad discretionary mandate, Plaintiffs contend that Section 78b provided authority only for an increase in benefits, focusing instead on the provision that the Council may amend or change the plan "for the purpose of providing benefits for members…in excess of those benefits authorized or required by the provisions of said Section 78a." But that modifying phrase – "in excess of those benefits" – no longer exists, having been specifically deleted from the 1965 Charter. (Exh. 5215 [Charter, art. XV, § 1500].)

The 1965 Charter Committee Minutes provide further evidence that this reservation of rights clause was not intended to permit only increases. In 1964, employee organizations and others argued to the Charter Revision Committee that the Charter should include minimum benefit provisions so that retirement benefits could not be decreased. (Exhs. 5207, 5210, 5212, 5213 [Letters to Charter Revision Commission].) These requests came after the City Attorney informed the Charter Committee, in May 1964, that under the 1961 charter, "retirement benefits could have been reduced." (Exh. 5206 [Charter Committee Minutes, May 26, 1964].) On December 8, 1964, the Charter Committee revised the proposed 1965 charter to include minimum benefits. (Exh. 5214.) This legislative history demonstrates that the drafters of the 1965 Charter did not consider the reservation of rights to preclude benefit decreases, and therefore included minimum benefits to ensure benefits would not be reduced below the stated level.

Plaintiffs' Pension System Arguments. Some Plaintiffs have contended that a reservation of rights clause is antithetical to a public pension system. To the contrary, reservation of rights clauses serve the important purpose of identifying matters of public policy, which are subject to control by the public entity. In *REAOC*, the California Supreme Court acknowledged that legislatures, such as the San Jose City Council, exist principally to establish policy, not to enter

into private contracts. "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *REAOC, supra,* 52 Cal.4th at 1185 (quoting *Nat. R. Passenger Corp. v. A.T.&S.F.R. Co.*, 470 U.S. 451, 466 (1985). *REAOC*'s observation is consistent with federal reservation of rights cases: "Since the Act was designed to protect future, as well as present, generations of workers, it was inevitable that amendment of its provisions would be necessary in response to evolving social and economic conditions unforeseeable in 1935...." *Bowen v. Public Agencies Opposed to Social Security Entrapment,* 477 U.S. 41, 51 (1986).

Some Plaintiffs contend that there are limits to reservation of rights clauses, citing *Bowen*'s statement that: "Congress could not rely on that power to take away property already acquired under the operation of the charter, or to deprive the corporation of fruits actually reduced to possession of contracts lawfully made..." *Bowen, supra,* 477 U.S. at 51-3, 55. The provisions of Measure B at issue in this motion do not come anywhere near the limits articulated in *Bowen.* Nothing in Measure B takes away *any* earned retiree pension or health benefits. The Chambers' reservation of rights permits Measure B's changes, but even if the reservation were not present, plaintiffs' cannot prove a violation of their rights.

2. The Evidence At Trial Demonstrated That The Municipal Code Authorized "Additional" Employee Pension Contributions

In support of their claims, plaintiffs rely on older Municipal Code sections that specified that the City pays for pension plan unfunded liabilities.[11] But in 2010, *before* the enactment of Measure B, the City had amended the Municipal Code to authorize the City to require employees to pay "additional contributions" to offset the City's payments towards pension system unfunded liabilities.

MEASURE B	PRE MEASURE B
Charter Section 1506-A: (b) ....Current Employees shall have their compensation adjusted through additional retirement contributions in increments of 4% of pensionable pay per year, up to a maximum of 16%, but no more than 50% of the costs to amortize any pension unfunded liabilities	**Federated Plan,** Notwithstanding any other provisions of this Part 6 or of Chapter 3.44, members of this system **shall make such additional retirement contributions** as may be required by resolution adopted by the city council or by executed agreement with a recognized bargaining unit. (Municipal Code Section 3.28.755 [Exh. 5302]) Notwithstanding any other provision of Part 7, **the city shall be entitled to an offset** of a percentage, as is determined appropriate by the actuary for the federated city employees retirement system, **of the additional employee retirement contributions** that are made under section 3.28.755 **against the retirement board contributions that the city would otherwise be required to make** under this Part 7. (Section 3.28.955) **Police and Fire Plan,** A. Notwithstanding any other provisions of this Part 10 or of Chapter 3.44, members of this plan who are not subject to the provisions of City Charter Section 1111 **shall make such additional retirement contributions** as may be required by resolution adopted by the city council or by executed agreement with a recognized bargaining unit.
	B. Notwithstanding any other provisions of this Part 10, members of this plan who are subject to the provisions of City Charter Section 111 **shall make such additional retirement contributions for fiscal year 2010-2011** as may be required executed agreement with a recognized bargaining unit or binding order of arbitration.

[11] Exh. 5302, Municipal Code 3.28.710, 3.28.880,[Federated]; Exh. 5303, Municipal Code 3.36.1520, 3.36.1550C [Police and Fire].

	C. Notwithstanding any other provision of Part 10, **the city shall be entitled to an offset** of a percentage, as is determined appropriate by the actuary for the police and fire department retirement plan, **of the additional employee retirement contributions** that are made under subsection A. of this 3.36.1525 **against the retirement board contributions that the city would otherwise be required to make** under this Part 10. (Municipal Code Section 3.36.1525C [Exh. 5303])

The history behind the enactment of these Municipal Code sections demonstrates that the City never "'clearly'... evince[d] a legislative intent to create private rights of a contractual nature enforceable against" the City, i.e., a legislative intent that the City itself pay all unfunded liabilities in perpetuity, no matter what the cost. *REAOC*, 52 Cal. 4th at 1186-87.

First, the Charter characterizes unfunded liabilities as "prior service" which is not subject to the 3 to 8 contribution ratio applicable to "current service." The Charter specifically excepts "prior service" contributions from this ratio. (Exh. 5216, Charter 1504(b), 1505(c).) The City historically treated the payment of unfunded liabilities as a matter of City Council discretion, assignable either to employees or the City. (Exh. 5401 [1971 memo].) These facts were admitted by plaintiffs. (POA Trial Br. at p. 11-12; Sapien Memo in support of Preliminary Injunction 1/31/13, p. 5.)

Second, the older Municipal Code sections relied upon by plaintiffs, enacted during the 1970's, contain no language showing an intent to create a vested right in employees. *See Teachers' Retirement Board v. Genest*, 154 Cal.App.4th 1012, 1022 (2007) (express intent to enact payments "as vested benefits pursuant to a contractually enforceable promise to make annual contributions"). *Here*, in contrast, w*here the San Jose Municipal Code intended benefits to be vested, it has said so expressly, and defined the term, "vested."* (Exh. 5302, Federated plan, Municipal Code 3.28.1080, Police and Fire plan, Municipal Code 3.36.747 [Providing for "vesting" of service retirement benefits and accumulated contributions as "the nonforfeitable right to the benefit the member has accrued."].)

Third, the circumstances surrounding the enactment of these older sections do not show any intent to create a vested right in the City's payment of unfunded liabilities, no matter what the cost to the City. Available historical documents demonstrate that in the 1970's, when these

Municipal Code sections were first enacted, the City's payments for unfunded liabilities were minimal. (Exh. 5401 [1971 Resolution approving MOA, 7.09% % City prior service cost], Exh. 5402 [1978 memo, 5.25 % City prior service cost,], Exh. 5403 [1979 actuarial report, Bates nos. 000535, 000 539, 6.68% City "balance" due for prior service].)[12] At trial, plaintiffs offered no extrinsic evidence that in the 1970's, or at any time since, the City Council intended to take on a liability of unlimited proportions, enforceable by employees for decades.

Fourth, although the Court's summary adjudication order stated that the City had not identified an ordinance requiring employees to pay for unfunded liabilities, the City in fact did enact such ordinances. As shown above, in 2010, when the City's payment for unfunded liabilities skyrocketed, the City amended the Municipal Code to authorize "additional" employee *contributions to be used to offset the City's pension contributions* which include unfunded liabilities. (Municipal Code 3.28.755, 3.28.955 [Federated plan], 3.36.1525(C) [Police and Fire plan].) These code sections are included in Exh. D attached hereto. These ordinances not only authorize the payment of additional pension contribution rates by agreement, they also authorize payment as required by City Council resolution or, for unions subject to interest arbitration, by binding order of arbitration. (*Id.*)

Plaintiffs never sued to invalidate these ordinances, and the statute of limitations has run. *Mason v. Retirement Bd.*, 111 Cal.App.4th 1221, 1229, 1232 (2003) ("A challenge to the validity of an ordinance must normally be brought within three years," and giving "substantial deference" to interpretation of retirement provisions that had "never been formally challenged prior to the present suit").

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[12] Historical documents also demonstrate, that until recent years, the City's rate for prior service costs remained low. See e.g. Exh. 651 [1987 Federated report, Bates no. 000781, .61% City prior service cost], Exh. 440 [1990 Federated report, Bates no. 004008, .05% City prior service cost], Exh. ___ [more recent reports].

3. The Evidence At Trial Demonstrated That The City And Employee Unions Treated Employee Pension Contributions As Bargainable Elements Of Compensation.

If there were any doubt about the intent of the Municipal Code, the evidence at trial demonstrated that the City and its employee unions both considered employee contribution rates to be elements of "total employee compensation," subject to bargaining, and thus not vested.

For many years, the City did not need to seek economic concessions from employees, and thus the issue of employees paying additional pension contributions did not arise. (Tr. p. 880 [Gurza].) But in 2010, in light of the grave financial situation facing the City, including a projected budget shortfall of $116 million, the Mayor and City Council directed City staff to begin discussions with City employee unions to obtain concessions equaling an ongoing ten percent in total compensation. (Tr. p. 711-12 [Gurza], Exh. 5118, p. 6.) "Total compensation" is the total cost to the City for an employee, including pay and benefits – which include retirement benefits. (Tr. p. 713, 717-18 [Gurza], Exh. 5434, Article 7.) [13]

In response to the City's proposal to reduce total compensation by 10% on an ongoing basis, many unions proposed that the compensation reduction be achieved by employees paying additional pension contributions to defray the City's cost of unfunded pension liabilities. (Tr. pp. 720-33 [Gurza].)[14] In the course of these negotiations, the unions never indicated that payment of the additional pension contributions to defray unfunded liabilities might violate any vested rights.

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[13] For example, the City's 2013-2014 budget reflects an average total compensation cost for police officers of $196,449, which includes $105,680 in salary (not including overtime), $76,280 in retirement costs (City contributions for pension and retiree health care), $11,643 for the employee health care, and $2,846 in fringe benefits. (Tr. p. 760, Exh. 6018.)

[14] See Exh. 5407 [Firefighters: additional 5% of base pay to be placed in retirement fund, Exh. 5409 [IBEW: additional 7.5% pension contribution], Exh. 5410 [OE3: additional 5% pension contribution], Exh. 5411 [POA: additional 5% pension contribution for prior service], Exh. 5413 [Local 230: 5% additional pension contribution], Exh. 5414 [POA, Firefighters, AEA, CAMP, ABMEI, AMSP, IBEW: additional 5% or 7.5% pension contribution], Exh. 5416 [OE3: Additional 7.5% pension contribution], Exh. 5420 [AEA, ABMEI, CAMP, AMSP, IBEW, OE3: additional 10% pension contribution], Exh. 5421 [Labor Unions' Proposal: additional 10% pension contribution], Exh. 5422-5426, 5430 [Firefighters: additional 5.25% - 6% pension contribution].

(Tr. p. 733 [Gurza].) On the contrary, the unions treated the additional pension contributions as negotiable, like wages. (Tr. p. 733.) Indeed, Mr. Platten, attorney for the Sapien group of plaintiffs in this case, appeared before the City Council to advocate that employees be permitted to take the 10% compensation reduction in the form of additional pension contributions and vouched for its legality. (Tr. p. 737-40 [Gurza], Exh. 5435 [video clip of Platten statements to City Council].)

Mr. Platten specifically stated:

> "There is no language if you take a look at the Charter section 1504 or 1505 subparagraph c, there is no language in the Charter that prohibits any agreement between collective bargaining parties to permit employees to subsidize any portion of the employer's contribution right. No prohibition, no language that says you can't do that in a collective bargaining agreement anywhere in the Charter."
>
> * * *
>
> "... this is an issue not of legal technicality but of political will. You have before you a proposal that clearly even if we were to set aside and agree for a moment that a certain portion of the normal cost would be subsidized by the employees, clearly the large majority would not be normal costs, its prior service costs. We also have agreed that if for any reason the contributions would cease that we would begin immediate bargaining to provide the city the exact savings to the penny so the protection is there for the city if for some reason legally we're wrong about this so that's the answer I can give you Councilmember Chirco to your question."

Mr. Gurza testified that the unions proposing the additional contribution rate payments "had a very strong preference for their concessions to be in the form of additional retirement contributions versus a straight wage reduction." (Tr. p. 741.) In the unions' view, additional pension contributions were preferable because they: did not reduce base pay, upon which premium pay and overtime are based; did not reduce final average salary, upon which the pension benefit is based; were pre-tax, meaning that employees did not pay taxes on the amount of the contribution; and would be deposited into the employee's retirement account, meaning the contribution would be returned to the employee if the employee left City service or was laid off. (Tr. p. 741-42 [Gurza].)

As a result of the negotiations, in 2010, six unions agreed to concessions primarily in the form of paying additional pension contributions; other unions ended up with concessions in the form of reduced wages, and no agreement was reached with three. (Tr. p. 744-46 [Gurza], Exh. 6023 [chart], Exh. 5117.) The agreements expressly provided that the additional pension contributions were for the purpose of reducing the City's contributions towards unfunded liabilities. (Tr. p. 779-81, 782-85, 887 [Gurza], Exh. 5452 [AEA, Bates No. 000155-157], Exh. 5470 [POA, Bates No. 000551-533]; *See also* Exh. 5456 [AMSP], Exh. 5458 [CAMP], Exh. 5464 [IBEW], Exh. 5466 [OE3]. A chart is attached as Exh. E.

For example, under the heading "Wages and Special Pay," the AEA MOA states, which is attached hereto as Exh. F.

> On-going Additional Retirement Contributions. Effective June 27, 2010, all employees who are members of the Federated City Employees Retirement System will make additional retirement contributions in the amount of 7.30% of pensionable compensation, and the amounts so contributed will be applied to reduce the contributions that the City would otherwise be required to make for the pension unfunded liability, which is defined as all costs in both the regular retirement fund and the cost-of-living fund, except current service normal costs in those funds. This additional employee retirement contribution would be in addition to the employee retirement contribution rates that have been approved by the Federated City Employees' Retirement System Board. The intent of this additional retirement contribution by employees is to reduce the City's required pension contribution rate by a commensurate 7.30% of pensionable compensation, as illustrated below:
>
> | Federated | | | |
> |---|---|---|---|
> | | City | Employee | Total |
> | Current Contribution Rates | 29.59% | 10.30% | 39.89% |
> | Contribution Rates With Additional Employee Contributions | 22.29% | 17.60% | 39.89% |
>
> Note: Additional contributions made by employees do not affect the retiree healthcare rates.
>
> One-Time Additional Retirement Contributions (Fiscal Year 2010-

> 2011). In addition to the retirement contributions specified above, effective June 27, 2010, through June 25, 2011, all employees will make an additional retirement contribution in the amount of 3.53% of pensionable compensation, and the amounts so contributed will be applied to reduce the contributions that the City would otherwise be required to make during that time period for the pension unfunded liability, which is defined as all costs in both the regular retirement fund and the cost-of-living fund, except current service normal costs in those funds. This additional employee retirement contribution would be in addition to the employee retirement contribution rates that have been approved by the Federated City Employees' Retirement System Board.

The agreements included a "Contingency Provision" which provided that, in the event the additional employee contribution rates were not implemented, or the City's contribution rate could not be reduced by a commensurate amount, the "equivalent amount of total compensation shall be taken as a base pay reduction …." (Tr. p. 781-82, E.g., Exh. 5452, AEA MOA, Bates nos. 000157.) They also included a provision in which the unions agreed to the amendment of the Municipal Code to reflect the requirement that employees pay the additional contributions. (E.g., Exh. 5452, Bates no. 000167-168.) Other unions agreed to or were given a straight 10% wage reduction. (Exhs. 5417, 5450, 5454, 5473, 5474.)

In subsequent years, although some unions wanted to continue paying additional pension contributions (Exh. 5428 [Local 21 e-mail]), the City switched to a salary reduction because it was more advantageous to the City. (Tr. p. 825 [Gurza].)[15] City employees continued to pay 10% of compensation, which continued to defray the City's pension contribution payments, but in the form of reduced wages.[16] Some unions agreed to do so; in other cases, where the City and the union could not agree, the City imposed a salary reduction. (Tr. p. 824, Exhs. 5461, 5469.)[17]

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[15] The additional pension contributions had been deposited in employee pension accounts, but with City layoffs employees were taking the funds with them, so the City was not achieving the intended savings. (Tr. p. 825 [Gurza].)

[16] See Exh. 6023 [Chart], Exhs. 5451, 5453, 5455, 5459, 5459, 5462, 5463, 5465, 5467, 5471, 5472, 5475.

[17] For example, the City imposed a 12% salary reduction on AFSCME, which included not only the 10% previously agreed to by other unions, but also an additional rollback of a prior 2% wage (footnote continued)

This evidence demonstrates that the parties treated employee pension contributions towards unfunded liabilities as a term of employment, akin to a wage reduction, and not as an immutable vested right.[18] Mr. Gurza's testimony and the evidence of City and union negotiations were not challenged at trial. In fact, Plaintiffs presented no evidence on this topic.[19]

4. Elements Of Public Employee Compensation, Subject To Negotiation, Do Not Give Rise To Vested Rights

A series of federal and state court decisions have held that terms of compensation, subject to negotiation by unions and employers, do not give rise to vested rights, even if related to retirement. In *San Diego Police Officers Ass'n v. San Diego City Employees Retirement System*, 568 F.3d 725 (9th Cir. 2009), after negotiations came to impasse, the City "imposed" upon the police officers' union (1) a reduction in the amount the City would "pick up" of the employee's pension contribution, (2) the alternative of a salary reduction for employees not paying contributions, and (3) a modification of eligibility requirements for retiree health benefits. (*Id.* at pp. 738-40.) In each case, the Court found no vested right, finding the "pick up" and salary reductions to be "compensation items" and "the retiree medical benefits here were considered a term of employment that could be negotiated through the collective bargaining process." *(Id.)*

Similarly, in *San Bernardino Public Employees Assn. v. City of Fontana*, 67 Cal.App.4th

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increase. (Exh. 5461, 5469.)

[18] Even prior to 2010, employees had been required to pay for unfunded liabilities. Plaintiffs' actuarial expert Thomas Lowman admitted that in 1997, an arbitrator had required payment of unfunded liabilities by sworn employees in connection with a retroactive benefit improvement. (Tr. p. 281-282.) Alex Gurza also testified that the payments were for unfunded liabilities. (Tr. p. 945.) The most recent Police and Fire Plan actuarial report confirms that employees have made payments for unfunded liabilities, as does the Municipal Code. (Sapien Exh. 229, p. 22, Municipal Code 3.36.1525.1555A-C.) Plaintiffs emphasize the narrow scope of this payment, but it demonstrates that employees have been required, even without agreement, to pay for unfunded liabilities.

[19] Instead, Plaintiffs point to statements made by former City Attorney George Rios and Alex Gurza that the City was responsible for unfunded liabilities or was guarantor of the plan. But these statements carry no weight. They were arguments made in arbitrations in which the unions were seeking enhanced retirement benefits, were not statements of legislative intent by the City Council, and simply reflected the state of the Municipal Code at the time. (Tr. p. 941 [Gurza testimony].)

1215, (1998), over union objection, the Court held that personal leave and longevity benefits, negotiated through an MOU, did not give rise to vested contractual rights. "It has long been held that 'public employees have no vested right in any particular measure of compensation or benefits, and that they may be modified or reduced by the proper statutory authority." (Id. at p. 1223, quoting *Butterworth v. Boyd*, 12 Cal.2d 140, 150 (1938).)[20]

Although a change in an employment term may affect a retirement benefit, "indirect effects on pension entitlements do not convert an otherwise unvested benefit into one that is constitutionally protected." *San Diego*, 568 F.3d at 738 (fact that salary reduction reduced amounts in retirement account did not violate any vested right); *see also Vielehr v. State of California*, 104 Cal.App.3d 392, 395-96 (1980) (statute reducing amount of interest paid to public employees who withdrew their pension fund contributions upon leaving employment but prior to retirement did not affect a vested right); *Miller v. State of California*, 18 Cal.3d 808, 815-17 (1977) (changing mandatory retirement age did not impair any contractual obligation).

Measure B specifically addresses compensation. Current employees who do not opt into a new retirement plan "shall have their compensation adjusted through additional retirement contributions." (Section 1506-A(b).) The conduct of the City and its unions demonstrates that increased contribution rates are an element of employee compensation, and actually more beneficial to employees than the alternative of a wage cut. Increased contribution rates do not affect employee pension benefits, they simply reduce the amount of compensation paid to employees going forward.

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[20] Case law recognizes that unions cannot negotiate away the vested rights of their members. *San Bernardino Public Employees Ass'n v. City of Fontana*, 67 Cal.App.4th at 1225 ("a collective bargaining unit may not bargain away individual statutory or constitutional rights which flow from sources outside the collective bargaining agreement itself") (citing cases); *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182 n.20, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971) ("Under established contract principles, vested retirement rights may not be altered without the pensioner's consent"). This case law further demonstrates that no one thought vested rights were implicated. For example, no plaintiff has suggested that the union could negotiate a reduction in a pension benefit, without specific signed waivers by its members.

The POA contends that *San Diego Police Officers* does not apply, because here the unions entered into only a one time agreement to make additional pension contributions. (SJPOA Trial Br. at p. 14.) But evidence at trial demonstrated that the City only recently had the need to seek economic concessions, and since 2010, the unions have helped defray the cost of pension unfunded liabilities either in the form of increased pension contributions or decreased wages. The Municipal Code section governing the Federated unions is not limited to one year; the Code section governing the police officers is for one year, but the POA subsequently agreed to a wage reduction that served the same purpose as the additional pension contributions. (POA Exh. 21, Bates no. POA001047.)

The case law relied upon by Plaintiffs is inapposite because the cases did not involve any history of pension contribution rates being treated as a component of 'total compensation." For example, in *Ass'n of Blue Collar Workers v. Wills*, 187 Cal.App.3d 780 (1986), there was no evidence that the unions had previously agreed to pay additional contributions, or make wage concessions, to help defray unfunded liabilities; nor was there any prior authorizing amendment of the Municipal Code. In *Wills*, over union objection, the City Council simply enacted a resolution requiring employees to split the unfunded liabilities with the City. *Id.* at pp. 784-85. The other cases relied upon by plaintiffs, of an earlier vintage, are similarly distinguishable. None of these cases involved treatment of pension contributions as an alternative to reduction of wages. See *e.g.; Bellus v. City of Eureka*, 69 Cal.2d 336 (1968) (City attempted to limit pensions to funds existing in retirement funds; no discussion of employee contributions); *Allen v. City of Long Beach*, 45 Cal. 2d 128 (1955) (City imposed increased contribution rates; no history of prior employee agreements, nor Municipal Code authorization).

5. The Benefits Booklets, Retirement Newsletters And Fact Sheets Introduced By Plaintiffs Are Of Little If Any Relevance

Plaintiffs introduced numerous Retirement System documents, such as benefits handbooks, newsletters, flyers and other documents. For the most part, these publications do not address the issues involved in this case, or simply reflect the Municipal Code at the time and do not have independent evidentiary value. For example, most Handbooks contain the admonition: "IF

THERE IS ANY DISCREPANCY OR CONFUSION BETWEEN THE INFORMATION IN THIS HANDBOOK AND THE INFORMATION IN THE CODE, THE CODE WILL PREVAIL." (See e.g. Exh. 328) [21]

At trial, plaintiffs cited *Requa v. Regents of the University of California*, 213 Cal.App.4th 213 (2012), in support of the admission of employee handbooks and other information disseminated to employees. But *Requa* was decided on demurrer and did not decide any evidentiary issues. In contrast, the decision on remand from the *REAOC* case – decided by the California Supreme Court – did make evidentiary rulings. The trial court held that extrinsic evidence could not supply a promise – a basis for vested right – separate and apart from the official ordinances or resolutions of the county. *Retired Employees Association of Orange County v. County of Orange* (REAOC), No. SASCV 07-1301 AG, 2012 U.S. Dist. LEXIS 146637, 1-3 (C.D. Cal. Aug. 13, 2012). The Court explained: "REOC [Retired Employees Association] turns this analysis on its head by asking this Court to *begin* its inquiry with the parties' course of conduct and other extrinsic evidence. This Court refuses to cobble together evidence to manufacture a promise that the Board never made." Here, the documents offered by plaintiffs do not add anything beyond the Municipal Code, but even if they did, these documents could not be considered as proof of a "contract."

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[21] In addition to handbooks, AFSCME offers a total of 21 Retirement Services newsletters. (Exhibits 356-357, 511-21.) There is little of relevance in these documents. They are informal in nature, giving chatty advice on health, fitness and nutrition, updates on personnel changes in Retirement Services, contact information, advice on how to apply for retirement benefits, and occasionally a very basic summary of the formula that governs pension benefits – which is not at issue in this case. AFSCME also offers a series of miscellaneous Retirement System information flyers and brochures on such general topics as domestic partner benefits, explanations that employees are not covered by social security, announcement of "brown bag" presentations, and general summaries of pension formulas. (Exhibits 343, 344, 345, 358, 362, 371, 410, 411.) These documents are of little relevance to the issues presented by this case and when they do discuss benefits, refer back to the Municipal Code. AFSCME offers a number of benefits fact sheets that describe the basic retirement benefits offered to employees. (Exhibits 332-42.) Most of these benefits are not at issue, but those that are involved in this litigation are described in conformance with the Municipal Code at the time. The Retirees offer a similar array of irrelevant materials.

6. For Employees, Payment Of Additional Pension Contributions Is Preferable, And More Than A Comparable Advantage, To A Wage Cut

Even if the Court finds that the Municipal Code created a vested right to the City paying for all unfunded liabilities, the Court must still consider whether Measure B provides a comparable advantage for any disadvantage created by the imposition of increased contribution rates. "An employee's vested contractual rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system." *Board of Administration v. Wilson*, 52 Cal.App.4th 1109, 1132 (1997). "To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." *Id.* at 1132-33.

The payment of increased contribution rates "bears some material relation to the theory of the pension system" because it provides crucial financial support to the integrity of the system. *Claypool v. Wilson*, 4 Cal.App.4th 646, 666 (1992) (Changes made to effect economies and save the employer money do "bear some material relation to the theory of a pension system and its successful operation....").

At trial, the City Auditor's report and testimony showed that, as of 2009, the City had a $3.4 billion pension and retiree healthcare unfunded liability. (Exh. 5101, pp. 22-23; Exh. 5102, p. 1516.) In 2010 the pension funds were significantly underfunded (Federated – less than 70% funded; Police and Fire – 80% funded [Exh. 5102, p. 1515]), and the City Auditor testified that those levels have continued to drop. The City Auditor predicted that if the downward trend continued, "eventually" there would be "insolvency" in the plans because "there would not be sufficient assets in the plan to pay pensioners." (Tr. p. 433) This testimony was not contradicted at trial; in fact, plaintiffs put on no testimony about the state of the City's pension plans.

The POA contended in its trial brief that the City's own serious financial situation could not be a factor, but *Claypool*, supra, states otherwise. At trial, the City Auditor and City Manager testified to City budget deficits, the role of the City's retirement contributions, and the resulting

cuts in essential City services. (See section D, infra.) The most recent budget forecast projects a continued increase in City costs for employee retirement benefits from $245 million in 2012-13 to $329 million in 2017-18, almost $100 million dollars. (Exh. 5109, p. 18.)

As demonstrated in the next section, Measure B provides for mandatory wage decreases to fund pension plan unfunded liabilities – plainly a legal alternative. Given that reality, the payment by employees of an increased contribution rate, which is more beneficial than a wage cut, would be more than a "comparable new advantage." Achieving the City's cost-saving objectives through increased pension contributions, as opposed to decreased salaries, actually benefits employees, because employee pension contributions are deducted pre-tax, do not affect final compensation for pension purposes, and are deposited into employees' pension accounts from which they can be refunded if an employee leaves before retirement. (Tr. p. 741-41 [Gurza], Exh. 5428.)

At trial, the Court questioned whether the comparable new advantage had to relate to a benefit in existence *before* the comparable new advantage was enacted. We have found nothing in the case law that imposes such a rule. To the contrary, the case of *Claypool v. Wilson* found that a cost of living modification was a comparable new advantage based on another aspect of the same law – a legally imposed second tier. *Claypool*, 4 CalApp.4th at p. 669 ("It is apparent that Petitioners' claim of unreasonable modification succeeds only if the mandatory second tier is invalid if applied to the former supplemental Cola programs. Unless the second tier is invalid the new supplemental Cola program provides an obvious new advantage for present employees. . . .").

Section 1514-A

D. Section 1514-A: Savings (In Lieu of Contributions)

Plaintiffs also challenge Section 1514-A which calls for commensurate savings through wage reductions if the City cannot achieve savings through increased pension contributions. This challenge fails for the simple reason that the City has plenary authority under the Constitution to regulate compensation. The POA and AFSCME make a secondary argument, that this section violates the Constitution because it chills their right to free speech. As set forth below, this argument also fails as the unions did not meet their burden of proof.

1. The City Has the Constitutional Authority to Control Employee Compensation

At the outset, it should be noted that City unions previously to the same provisions existing in Section 1514-A. Specifically, in 2010, some union MOAs agreed to the alternative of wage cuts if employees could not pay the additional contribution rate. Moreover, beginning in 2011, if unions did not agree to a 10% wage cut, the City imposed it. (Tr. pp.824; Exhs. 5452, 5456, 5458, 5464, 5466, 5470, 6023.)

MEASURE B	PRE MEASURE B
Section 1514-A: Savings In the event Section 6(b) is determined to be illegal, invalid or unenforceable as to Current Employees (using the definition in Section 6(a)), then, to the maximum extent permitted by law, an equivalent amount of savings shall be obtained through pay reductions. Any pay reductions implemented pursuant to this sections shall not exceed 4% of compensation each year, capped at a maximum of 16% of pay.	**Federated Union Agreements** In the event that the additional employee retirement contributions described above are not implemented for any reason …the equivalent amount of total compensations shall be taken as a base pay reduction …. (Exh. 5452, Bates No. 000169,) **Police Agreement** In the event that the additional employee contributions described above are not implemented for any reason . . . the equivalent amount of total compensation shall be taken as a base pay reduction . . . . (Exh. 5470, Bates No. 000553.)

Although both 1504-A and 1514-A address employee compensation, Section 1514-A does so directly by reducing salaries. Plaintiffs cannot prove Section 1514-A to be illegal because public employees do not have a vested right to a particular salary. *San Diego POA v. San Diego*

City Employees Retirement System, 568 F.3d 725, 737 (9th Cir. 2009) ("It is well established that public employees have no vested rights to particular levels of compensation and salaries may be modified or reduced by the proper statutory authority"); *San Bernardino Public Employees Ass'n*, 67 Cal.App.4th at 1223 (public employees have no vested right in any particular measure of compensation or benefits).

These cases follow the seminal decision in *Butterworth v. Boyd*, 12 Cal.2d 140 (1938) where the California Supreme Court expressly held that a City Charter amendment did not violate employees' vested rights by requiring compulsory salary deductions to fund a health service system. *Butterworth v. Boyd*, 12 Cal.2d at 150. "The charter governs the salaries of city employees; by the amendment to the charter, in force at the time the municipal salaries were fixed for the current fiscal year, the deduction was authorized and made accordingly. It is well settled that public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority." *Id.*

Based on this unbroken line of authority, the City Charter may unquestionably reduce salaries without violating vested rights.

2. Plaintiffs Have Not Proven That Section 1514-A Is A Violation Of The Right To Petition

The only argument remaining is the contention by AFSCME and the SJPOA that Section 1514-A "chills" their right to petition the courts, because if they successfully challenge the increased contribution rates of Section 1506-A, their pay will be decreased under Section 1514-A. They failed to meet their burden of proof on this claim.

The right to petition is a variant on the right to free speech. *Vargas v. City of Salinas*, 200 Cal.App.4th 1331, 1345 (2011). Plaintiffs must prove that their legal challenge to increased contribution rates involves a matter of "public concern," and that Measure B restricts their legal challenge. *Id.* at 1345-1346. Even if they make this showing, they cannot prevail if the pay cut in the Savings Clause "was narrowly drawn to achieve a substantial governing interest that is content neutral and unrelated to the suppression of the exercise of First Amendment rights." *Id.* at 1346 (no infringement of right to petition by award of attorney fees against petitioner and in favor of

government in connection with anti-SLAPP motion).

Plaintiffs' "right to petition" claim fails for two reasons.[22] First, plaintiffs' claim is factually untenable, given that Measure B created no deterrent to filing suit. Indeed, lawsuits were filed within 24 hours of the passage of Measure B. Second, even assuming plaintiffs could meet their initial burden, they cannot overcome the overwhelming evidence that Measure B is content neutral, unrelated to the exercise of First Amendment rights, and is narrowly drawn to achieve an important interest.

City Evidence. Courts look to "reasons advanced" in the statute's "declaration of legislative purpose" in evaluating the government's interest. *Simpson v. Municipal Court*, 14 Cal. App.3d 591, 597-98 (1971) (relying on legislative findings in right-to-petition case). Measure B itself states that it is intended to achieve savings in order to "protect[] the City's viability and public safety, at the same time allowing for the continuation of fair post-employment benefits for its workers." Section 1501-A.

The trial evidence regarding City finances supports this intention. The City Auditor's report, entitled "Pension Sustainability: Rising Pension Costs Threaten the City's Ability To Maintain Service Levels – Alternatives For A Sustainable Future" (November 2010) [Exhs. 5101, 5102], showed that the City's pension costs had doubled in the decade ending 2010 from $54 million to $107 million. (Exh. 5101, p. 19, Exh. 5102, p. 1513.) The City Auditor testified at trial that the City's pension costs had continued to increase, to $208 million in 2012. (Tr. p. 427.) The report concluded that that "rising pension costs threaten the city's ability to maintain service levels," "it is important to do something about rising pension costs, and it is important to start now." (Exh. 5101, p. 67.) Although the City Auditor did not draft Measure B, her report made recommendations to reduce City costs, including additional cost sharing by employees. (Tr. p. 457-58, Exh. 5101, pp. 67-8, Exh. 5102, pp. 1531-32.) Key findings from the City Auditors report

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[22] Again, this claim was not made by any plaintiffs other than AFSCME and the SJPOA. So, the outcome of adjudication on this claim should not apply to any other plaintiff.

are attached hereto as Exh. G.

At trial, City Manager Debra Figone testified that, between 2003 and 2013, to balance its budget, the City had been required to make cuts totaling $670 million from its general fund budget, and reduce its total number of positions from 7,445 to 5,522, eliminating a total of 1,956 positions, almost 30% of the workforce. (Tr. p. 565, 568-571, Exh. 6016). [23] The most extreme budget and position cuts began in 2009-10, and extended over a three year period, during which the City was forced to cut a total of $318 million from the general fund and 1600 positions City-wide. (Tr. p. 571; Exh. 6016.) In 2012-13, after a decade of significant cuts, the City was able to balance its 2012-13 budget, but even then, again faced deficits in 2013-14 (Tr. p. 571, 572, Exh. 6016). Rising retirement costs were a significant reason for the City's budget shortfalls. (Tr. p. 575, Exh. 5102 p. 1527.)

Out of necessity, a key component of solving the fiscal crisis was to cut essential city services. (Tr. p. 577-86, Exhs 5113, 5114, 5115, 5116.) For example, the City cut 21% of sworn police officer positions, including layoffs of police officers; and cut 11% of firefighter positions, including the elimination of staffing for a Fire engine and a truck and fire company "brownouts." (Tr. p. 579, Exh. 5113.) Similar significant reductions occurred for libraries, community centers, park maintenance, senior and youth services, code enforcement (Exh. 5114); pavement and sidewalk repairs, street landscaping and city facilities and fleet maintenance (Exh. 5115); and city internal support services in finance, safety, training, technology (Exh. 5116). The City Manager testified that the City currently did not have the capacity "to adequately serve the residents of our City, just under a million people." (Tr. p. 586.) City staffing is at the level it was in 1988-89, "when the City had 200 to 250,000 fewer residents." (Tr. p. 586.)

Not only did the City reduce services, it was also forced to reduce employee pay. Beginning in 2010, the City cut employee pay by 10%, which continued over the following three

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[23] The City Manager had initiated two major deficit reduction programs, the 2008 General Fund Structural Deficit Elimination Plan (Exh. 5100) and the 2011 Fiscal Reform Plan (Exh. 5104).

year period. (Tr. p. 599-600; Exh. 5106, Exh. 5117.) And in November 2011, the City came to the brink of declaring a fiscal emergency, saved only by a last minute reduction in retirement costs related to the City's reduced workforce and pay cuts. (Tr. p. 600-01.) Although the City did not declare a fiscal emergency, in March 2012, when the City Council placed Measure B on the ballot, the City's fiscal situation was still serious and the "rising cost of pensions . . . continued to be a significant driver of [city] costs." (Tr. p. 602, Exhs. 6008, 6010, 6011, 6029, 6030 [charts]). [24] Key budget charts are attached hereto as Exh. H.

Plaintiff's Contentions. Plaintiffs did not introduce any evidence at trial but rely primarily on *California Teachers Ass'n v. State of California*, 20 Cal. 4th 327 (1999), which is completely inapposite here.[25] *California Teachers* involved a statutory requirement that a fired or suspended teacher pay half the cost of the hearing officer considering the teacher's appeal. The Court held that payment of judicial costs was unprecedented, had the inevitable effect of discouraging appeals, violated due process and was not supported by a legitimate state interest. *Id.* at 331, 333, 346. The Court stated that: "The imposition of a cost or risk upon the exercise of the right to a hearing is impermissible if it has 'no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them' (citations omitted.) The statutory cost provision must have a real and substantial relation to a proper

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[24] On cross examination, plaintiffs attempted to show that the City recently had turned the corner financially, *but this evidence not relevant to the situation in March 2012*. Moreover, the evidence shows only that the City has finally shrunk its costs, and therefore City services, to the point where deficits are smaller, with Measure B being part of that effort. (Exh. 6012, pp. 10, 11, 16-19) For example, a police substation, built with bond money, and ready since 2008, remains closed. (Tr. p. 697.) In the City Manager's view, the services offered by the City of San Jose to its residents are "inadequate." (Tr. p. 699.) Plaintiffs rely on a 2013 handout given by the City to bond rating agencies, but the handout itself shows the dramatic cuts in City revenues and services, and the importance of Measure B in showing the rating agencies that San Jose has taken prudent action. (POA Exh. 54.)

[25] AFSMCE also cites *Long Beach v. Bozek*, 31 Cal.3d 527 (1982), but that case decided that governmental entities could not sue for malicious prosecution, not an issue here. And AFSCME cites to *In re Workers Comp Refund Cases*, 46 F.3d 813 (8th Cir. 1995), but that case involved a law that required a party to pay all litigation expenses, win or lose, also not an issue here.

legislative goal." *Id.* at p. 434.

Here, in contrast to *California Teachers*, the City's reduction of salaries is not unprecedented (but is a standard cost-cutting measure), did not have the purpose or effect of discouraging litigation, does not violate due process and is supported by the proper legislative goals of reducing City costs. *In fact, in the 2010 MOAs, employee unions agreed that if employees were not able to make additional pension contributions, the same amount would be taken in the form of a wage cut in order to achieve the same savings for the City.* Obviously, the reduction in salaries to lower City costs, and enable the City to use those funds to pay for City services or employee costs, is a legitimate public purpose. Plaintiffs, who have the burden, have not proven any illegitimate motive or effect.

In *Zuckerman v. State Bd. of Chiropractic Examiners*, which distinguished *California Teachers*, the California Supreme Court found that a requirement to pay prehearing costs did not violate the right to petition because it was relatively common, did not have the purpose or effect of discouraging appeals, and was supported by a legitimate purpose. "We find nothing in the history of the Act, or in the administrative history of regulation 317.5, to suggest that regulation 317.5 was enacted to 'discourage hearing requests in which the [litigant] happens not to prevail,' the purpose we held impermissible in *CTA supra,* (citation omitted)." The Court held that reducing "operating costs" so the agency could "better achieve its statutorily mandated purpose" was a legitimate goal. *Zuckerman*, 29 Cal. 4th 32, 40-3 (2002) ("The United States Supreme Court has held that the public's interest in 'conserving scarce fiscal and administrative resources' is a legitimate goal"). The same is true here – Section 1514-A seeks to reduce operating costs to enable the City to achieve its purpose of providing services and paying its obligations.

The POA contends that Section 1514-A serves no legitimate purpose because "there is no requirement that the salary reductions be used to pay for unfunded actuarial liability." (POA Trial Br. at p. 32.) AFSCME makes a similar argument. Contrary to these contentions, it is not necessary for Measure B to require that all "savings" from wage decreases be funneled directly into the retirement system to pay for unfunded liabilities. Any reductions in City expenditures for wages will automatically reduce City expenses and free up additional City funds to pay for City

services and employee costs. The case law does not require earmarking. *See San Diego Police Officers Ass'n* 568 F.3d at 730-31 (City imposed alternative of salary reduction in order to mitigate City costs for its pension contributions).

Finally, Plaintiffs have made much of statements by the Mayor that the City faced a potential $650 million cost for retirement benefits in 2015-16, arguing that the Mayor's use of that figure somehow shows bad faith. But trial testimony demonstrated that this figure was first made at a public City Council "study session" by the Director of Retirement Services, in response to a "what if" question that was asked. (Tr. p. 587-93, 596-98, Exh. 5110 [tape of statement], Exhs. 5111, 5112 [City Manager memos]). In any event, any motive by a legislator is completely irrelevant to the legality of a legislative act. *County of Los Angeles v. Superior Court*, 13 Cal.3d 721, 726 (1975); *Sutter's Place Inc. v. Superior Court*, 161 Cal.App.4th 1370, 1375-77 (2008) ("courts cannot inquire into the motives of legislators in passing [legislation].").

Not only may the City decrease wages to pay for unfunded liabilities, it would be illegal for the Court to enjoin the City from doing so. Under the California Constitution Article XI, section 5(b), as demonstrated above, the City has the plenary authority to decrease employee compensation and preserve its workforce to restore and maintain City services. This is a legitimate goal unrelated to access to the courts or free expression.

3. The POA Has Not Proven A Breach Of Its Contract With The City.

The POA makes the additional claim that the increased contribution rates or reduction in wages constitutes a breach of its MOA with the City. But the City has not yet implemented either Section 1506-A or 1514-A, and has stipulated that it will not do so before January 1, 2014. (Exh. 5107 attached hereto as Exh. I). At trial, the POA did not introduce any evidence that the City intended to implement these sections in derogation of the City's current agreement with the POA. Moreover, should the City breach its contract with the POA, there are contractual remedies in the form of arbitration that must be pursued by the POA. *Charles J. Rounds Co. v. Joint Counsel of Teamsters No. 42*, 4 Cal.3d 888, 894 (1971) ("Party to collective bargaining contract . . . must exhaust these internal remedies before resorting to the courts"); *Service Employees International Union, Local 1000 v. Dep' of Personnel*, 142 Cal.App.4th 866, 870 (2006) (contractual arbitration

favored). Therefore the POA has not proven this cause of action.

Section 1507-A

E. Section 1507-A: One Time Voluntary Election Program

Section 1507-A provides for the one-time Voluntary Election Program ("VEP"), an alternative retirement plan, contingent on IRS approval, for employees who are members of the existing retirement plans, but who choose to avoid the increased contribution rate or pay reduction, in exchange for less generous retirement benefits. (Section 1507-A(c).) Plaintiffs attack this plan as presenting a "Hobson's Choice" – employees must pay higher contribution rates, or take lower wages, unless they enter this plan. Therefore, any challenge to this section is a repetition of plaintiffs' challenge to Section 1506-A. Plaintiffs failed to prove that there is anything intrinsically illegal about an alternative plan.[26]

[26] The City has not yet obtained IRS approval and has so stipulated with plaintiffs.

Section 1509-A

F. Sections 1509-A(a)(b) and 1509-A(c): Disability Retirements

In April 2011, the City Auditor issued a report that concluded the disability retirement system needed reform: "Disability Retirement: A Program In Need of Reform" [Exhibit 5103] The report noted the unusually high number of police and fire employees who retired on disability, the high rate of approvals and the number of employees granted disability retirement but still able to work. (Tr. p. 467-69; Exhibit 5103 pp. 9-10, 13-14, 20-24.) Key sections are attached hereto as Exh. J.

Measure B incorporated recommendations from this report: creation of an independent panel with medical expertise to decide disability retirement applications, appeal to a hearing officer, and amendment of the City Charter to clarify that the purpose of disability retirement was to provide income for those unable to work but not yet eligible for service retirement. (Tr. p. 477; Exhibit 5103, p. 33.)

Plaintiffs challenge the creation of the independent panel and the requirement that employees be unable to work before they are eligible for a disability retirement. These provisions are severable, and should be considered independently.

1. Section 1509-A(c): Expert Board to Determine Disability

Plaintiffs' challenge to this section fails because there is no vested right to control the administration of the plan.

Currently, disability retirement determinations are made by retirement board members, who include a simple majority of members of the public, as well as employees and retirees who are members of the retirement plans. (Exh. 5103, pp 4, 5, 16-18.) Consistent with the City Auditor's recommendations, Measure B requires instead that disability determinations be made by an independent panel of medical experts. (Section 1509-A(c).)

Plaintiffs claim they have a vested right to a decision by the fiduciaries for the retirement system – the members of the Retirement Board. But plaintiffs do not have a vested right, or any other right, in the composition of the body that makes disability determinations. *Whitmire v. City of Eureka*, 29 Cal.App.3d 28, 34 (1972) (where "only administrative and procedural changes" were involved, ordinances restructuring the Commission charged with administering the police

and fire retirement system did not violate vested rights), cited in *Claypool*, 4 Cal.App.4th at 670, 680 ("although active and retired members have a vested right to a pension, they do not have a vested right to control the administration of the plan which provides for the payment of pensions").

This issue must be decided against plaintiffs as a matter of law.

2. Section 1509-A(a)(b): Definition of Disability

Section 1509-A also reforms the eligibility requirements for obtaining a disability retirement by requiring that employees be unable to work. For Federated employees, the employee must be unable "to perform any other jobs described in the City's classification plan"; for Police and Fire employees, the employee must be unable to "perform any other jobs in the City's classification plan in the employee's department." (Section 1509-A(b).)

Previously, employees could obtain a disability retirement if they could not do their own job or any other job in their classification offered to them by the City. The April 2011 report by the City Auditor found that this definition had led to abuses:

- Of "22 sample cases in which the boards approved a disability retirement," all 22 were still able to work with work restrictions that "the boards' Medical Director found to be prophylactic," but "in only three cases was the City able to find an appropriate job for the employee . . ." (Exh. 5103, Audit, p. 25.)
- "In San José, 2 out of 3 Fire personnel, and more than 1 out of 3 Police personnel are retiring on service-connected disability . . . These sworn disability retirement rates are higher in San José than elsewhere." (Audit, p. 9.)
- Some employees who were granted disability retirements were working full time in their regular job right up to when they separated from the City; others were working full time in modified duty positions. (Audit, p. 9.)

The City Auditor's Report recommended that:

> [T] he City Council consider amending the City Charter and the Municipal Code to clarify that the purpose of the disability retirement benefit is to provide a stable source of income for employees who are incapable of engaging in any gainful employment but are not yet eligible to retire (in terms of age or years of service), and to limit disability retirement benefits to those employees who are incapable of

engaging in any gainful employment. (Audit, p. 26.)

Plaintiffs claim that the change in the eligibility criteria violates their vested rights because it denies them a disability retirement if they can do any job, even a clerk's job, with no requirement that it be offered. But they did not offer any evidence at trial and cannot prove their case.

First, Measure B's change in definition restricts the parties to their reasonable expectations for the program. *Walsh*, 4 Cal.App.4th at 697. The benefit itself is not changed. *Frank v. Bd. of Admin.*, 56 Cal.App.3d 236, 243 (1976) (vested rights violation where change was to benefits (decrease in monthly allowance from $475 to $90) rather than eligibility). Rather, Measure B *changes only the definition* for eligibility purposes to restore the original purpose of disability retirements. *Gatewood, v. Board of Retirement,* 175 Cal.App.3d at 311, 320-21 (1985) (upholding definition change on three independent grounds). Plaintiffs rely on the decision in *Newman v. City of Oakland Retirement Board*, 80 Cal.App.3d 450 (1978); but in that case, the police officer had already retired, and was collecting a pension, when the department changed the eligibility criteria for a disability retirement and called him back to service. In contrast, Measure B has no effect on employees already retired.

Here, the original purpose of a disability retirement was to provide for employees who, because of illness or injury, could no longer work. The original definition incorporated an expectation that the employee would be unable to do the functions of not only the employees' position or an alternative position provided by the City. But as a practical matter, over time, the City was unable to identify sufficient alternative positions. This created the anomaly of City employees, retired for disability on substantial pensions, but still able to work. (Exh. 5103, City Auditor report at pp. 19-25.) And in an apparent effort to game the system, many employees would wait to retire on a service retirement, then apply for disability retirement to obtain the tax advantages of a disability retirement, which excuses 40% of the benefit from federal tax. (Exh. 5103, pp. 13-15, 24) Measure B restores the original purpose of disability retirement – a benefit for those unable to work. Plaintiffs offered no evidence to rebut the City's case.

Second, Measure B and City policies provide countervailing advantages for any disadvantage, including: (1) for police and fire, a dramatic decrease in the amount of time the employee must be disabled before being eligible for retirement – from "permanent" or "at least until the disabled person attains the age of fifty-five (55) years" to "at least one year" (compare Charter § 1504(d) to Measure B, § 1509-A(b)); (2) City contributions to long-term disability insurance for work-related injuries (Measure B, 1509 A(d)); and (3) accommodations in alternative employment under the City's back to work and reasonable accommodation policies. See *Gatewood v. Board of Retirement*, 175 Cal.App.3d at, 320-21 (system may substitute disadvantages with comparable advantages).

At trial, the City introduced evidence of a package of policies, including the existing Worker's Compensation program, the City's Return To Work policy, and long term disability insurance, that provide alternatives for the employee who cannot do the employees' current job but is still able to work. (Exhs. 5800-5803, 6033.) Plaintiffs offered no evidence on this issue, and therefore the City's evidence of comparable advantages stands unrebutted.

For these reasons, plaintiffs cannot prove that section 1509-A violates their vested rights.

Section 1510-A

G. Section 1510-A: Emergency Measures to Contain Retiree Cost of Living Adjustments

Section 1510-A permits (but does not mandate) adoption of certain emergency measures *if* the City Council "adopts a resolution declaring a fiscal and service level emergency, with a finding that it is necessary to suspend increases in cost of living payments to retirees." The emergency measures consist of temporary suspension of COLAs, in whole or in part, for up to five years.

The law of vested rights acknowledges that even vested rights may be suspended in the event of an emergency. *Valdes v. Cory*, 139 Cal.App.3d 773, 790-91 (1983) (listing factors identified by both the California and United States Supreme Courts "which may warrant legislative impairment of vested contract rights on the grounds of necessity," and citing cases). The POA claims that suspension for a "fiscal emergency" is illegal under *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 311-12 (1979), but that case involved an emergency that had been declared, permitting the court to evaluate whether the requisite legal criteria had been satisfied. Here, the legality of the City's actions cannot be determined until the City adopts an emergency resolution. Until then, it is impossible to determine how the Council would exercise its discretion under this section.

Plaintiffs cannot prove this section involves any rights for two reasons. First, this claim is not ripe. *Fontana*, supra, 67 Cal.App. 4th at p. 1226 (where City had not yet modified retirement benefits, the matter was not ripe for review), relying on *Pacific Legal Foundation v. California Coastal Com.*, 33 Cal.3d 158, 171 (1982). The POA and other plaintiffs cite to recruitment flyers and benefits booklets describing the 3% COLA as guaranteed (e.g. POA Exhs. 11, 13). But these documents are not relevant, as Measure B only provides for suspension of the COLA in the event of an emergency.

Second, Plaintiffs complain that this section is defective on its face, because it does not require the City to pay back COLA payments suspended during the emergency. But this is not a basis to invalidate this section. There is no language that prohibits the City from paying back the suspended payments when the emergency is over. Under *Tobe*, to succeed on a facial challenge,

"petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." *Tobe v. City of Santa Ana*, 9 Cal.4th at 1084. Plaintiffs cannot make this showing as a matter of law because the City has not declared a fiscal emergency, and plaintiffs failed to elicit any evidence that the City would decline to repay suspended COLAs. In the absence of this evidence, plaintiffs' case is based on speculation as to what the City would do.

Section 1511-A

H. Section 1511-A: Supplemental Payments to Retirees

Section 1511-A discontinued the Supplemental Retiree Benefit Reserve (SRBR), and returned its assets "to the appropriate retirement trust fund." It does not foreclose the possibility of supplemental payments to retirees, but requires that such payments "shall not be funded from plan assets."

Plaintiffs challenge this section of Measure B on two grounds. First, plaintiffs contend that it violates the California Pension Protection Act. Second, plaintiffs assert a vested rights challenge, and contend that elimination of the SRBR deprives them of a right that was vested. Both theories are meritless.

1. Plaintiffs Failed to Prove That Section 1511-A Violates The Pension Protection Act

Plaintiffs claim that this section violates the Pension Protection Act, California Constitution, article XVI, section 17, because it transfers funds out of a "trust." But the evidence showed that SRBR was not a separate "trust," it was only a reserve, and the funds are still available for the benefit of retirees. *See Claypool v. Wilson*, 4 Cal.App.4th at 674 (using former supplemental COLA funds to reduce employer contributions to PERS did not violate Cal. Const., art. XVI, § 17, where the funds "continue to be 'held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system'"), quoting Cal. Const., art. XVI, § 17. Section 1511-A states expressly that the SRBR assets will be "returned to the appropriate retirement trust fund." Plaintiffs did not, and cannot, prove that the assets were removed from the retirement system, and they failed to prove any violation of the Pension Protection Act, on this ground alone.

2. Plaintiffs Cannot Prove That Section 1511-A Violates Their Vested Rights

Plaintiffs did not prove that SRBR violated a vested right because the payments are entirely discretionary. When payment is discretionary, there can be no "vested right" to receive a payment as a matter of law.

As a preliminary matter, the Court must reject the plaintiffs' challenge with respect to any

retiree who "retired prior to the effective date" when the SRBR program came into effect. *Claypool,* 4 Cal.App.4th at 660. There could not be a vested right with respect to such retirees because they did not perform any work that could possibly create a right to the benefit. *Id.*

There are two SRBR programs in place: one in the Federated plan, and one in the Police and Fire plan. Each program has certain differences, and each requires a separate analysis.

(a) SRBR – Federated Plan

For the Federated Plan, the Council discretion to authorize a distribution "if any" indicates that the Council did not intend to "suspend legislative control" over the SRBR. (See Municipal Code 3.28.340(E) ["The city council, after consideration of the recommendation of the board, shall determine the distribution, *if any*, of the supplemental benefit reserve to said persons"].)

From its inception, the City Council never authorized SRBR payments to retirees on a regular basis. The following shows that payments were made only for one third of the time that the Federated SRBR was in existence.

- From 1986 to 1999, the Council did not authorize any SRBR distributions to retirees, but rather used the SRBR funds to pay for other retirement benefits, and considered its elimination an option. (Exh. 5703 [2/24/88 Memo from City Manager to Mayor and City Council recommending SRBR be used to fund three new benefits, but if the SRBR could not pay for the benefits, "the SRBR should be eliminated]; Exh. 5704 [3/21/88 Memo from City Attorney to Mayor and City Council advising that benefits could be funded from SRBR and proper procedure to eliminate the SRBR].)
- From 2000 to 2009, the City Council authorized distributions but no retiree could count on receipt of any particular amount because the City Council had the authority to determine the formula for distribution. (See Exh. 5706 [Resolution 71870, authorizing methodology for distribution of Federated SRBR fund.])
- Beginning in 2010, and again in 2011 and 2012, the City Council suspended SRBR distributions, because the pension systems are unfunded liabilities had become dramatically worse and the SRBR was increasing the unfunded liabilities. (Exhs.

5707-5709, 5717, 5718.)

As testified by Deputy City Manager Alex Gurza, "because of the particular design of this SRBR," it could result in "excess earnings" – which would deplete retirement plan funds – even though "the plan has significant unfunded liabilities." (Tr. p. 766.) "That was something we simply had to confront. How could we be making a 13th check when these massive unfunded liabilities existed in the plan?" (Tr. p. 776.) In 2010, when the funds were dramatically underfunded, and the City had serious budget deficits, the City Manager recommended that the Council suspend distributions and the Council did so. (Tr. pp. 766- 67, Exh. 5707.) In 2011 and 2012, the City Manager repeated her recommendations and the City Council again suspended SRBR distributions. (Tr. pp. 767-68, Exh. 5709, 5717, 5718.)

In light of the problems caused by the SRBR, beginning in 2011, a number of employee unions entered into tentative agreements with the City that the SRBR would be terminated. (Tr. p. 768-775, Exh. 5710 [ABMEI agreement], Exh. 5712 [OE3 agreement], Exh. 5713 [AFSCME CEO agreement], Exh. 5714 [AFSCME MEF].) During retirement reform negotiations, the Retired Employees Association itself proposed that the SRBR benefits be redirected to reduce the unfunded liability for retiree healthcare. (Tr. 944-45, Exh. 6770.)

Given that the Municipal Code expressly makes SRBR distributions subject to City Council discretion; the City Council consistently exercised discretion over payments and the fund; and the unions acknowledged that elimination of the SRBR could be subject to negotiation, plaintiffs cannot establish the existence of a contractual right in their favor. *Doyle v. City of Medford*, 606 F.3d 667, 675 (9th Cir. 2010) (no property interest under due process analysis when city retains discretion); *Retired Employees' Ass'n of Orange County,* 2012 U.S. Dist. LEXIS 146637, *28-29 (no finding of vested right where governing body exercised its discretion each year).

Had the City Council intended to create a right to perpetual SRBR payments "it surely would have said so." *Ventura County Retired Employees' Ass'n, v. County of Ventura,* 228 Cal.App.3d 1594, 1598-1599 (1991); 228 Cal.App.3d at 1598 (lack of vested right demonstrated by discretionary language that legislative body "may authorize payment of all, or such portion as it

may elect" of healthcare premiums for retired employees). For example, in *Teachers' Retirement Board v. Genest*, 154 Cal.App.4th 1012 (2007), the court *did* find a vested right to the continuation of payments to a Teacher's Retirement System Supplemental Benefits Maintenance Account ("SBMA") where the statute providing the benefit specifically stated, "*It is the intent of the Legislature in enacting this section to establish the supplemental payments pursuant to Section 24415 as vested benefits pursuant to a contractually enforceable promise to make annual contributions from the General Fund to the [SBMA] in the Teachers' Retirement Fund in order to provide a continuous annual source of revenue for the purposes of making the supplemental payments under Section 24415.*" *Id.* at 1022, quoting Cal. Ed. Code, § 22954(c) (emphasis in original).

The Court's order on summary adjudication noted that "the City's discretion with regard to distributions is distinct from having discretion to abolish the SRBR altogether" (Order at 7:19-21), but if any element of a benefit involves discretion, there is no vested right. *Doyle*, 606 F.3d at 675-76 ("Only if the governing statute compels a result upon compliance with certain criteria, *none of which involve[s] the exercise of discretion by the reviewing body*, does it create a constitutionally protected property interest") (Emphasis in original)).

Here, the grant of discretion not to distribute a 13th check would be meaningless if the City must continue to fund the Federated SRBR. It would be unreasonable to have a fund set aside for SRBR distributions that, if never made, would simply sit idle and not be used to offset unfunded liabilities of the retirement plans. *Mason v. Retirement Bd.*, 111 Cal.App.4th 1221, 1230 (2003) ("A cardinal rule of construction is that statutes must be construed practically rather than technically, and interpreted in a way that will lead to wise policy rather than mischief or absurdity. … 'consideration should be given to the consequences that will flow from a particular interpretation'") (citations omitted).

Finally, Section 1511-A did not foreclose the possibility of supplemental payments to retirees, but required only that such payments "shall not be funded from plan assets."

(b) SRBR – Police and Fire Plan

The City Council also retained discretion over the Police and Fire SRBR, albeit not as

directly as over the Federated SRBR, in the following ways:

- The City Council reserved discretion to approve the methodology for distributions developed by the Retirement Board. (Municipal Code §3.36.580(D)(5) ["Upon the approval of the methodology by the City Council, the Board shall make distributions in accordance with such methodology."].)
- In 2002, the City Council adopted Resolution No. 70822, which approved "The Methodology for the Distribution Of Moneys In the Supplemental Retiree Benefit Reserve Of the Police and Fire Department Retirement Fund." (Exh. 5705 [Resolution No. 70822].) The resolution stated that: "This approval shall remain in effect *until such time as the Board recommends a subsequent methodology and the Council adopts a resolution approving the subsequent methodology*." (*Id.,* emphasis added.)
- Beginning in 2010, the Council amended the Code to provide that "there *shall be no distribution* during calendar years 2010, 2011, 2012 or during calendar year 2013 …." (Municipal Code 3.36.580 (D)(2)[emphasis added].)

Under the SRBR, the City had complete discretion on the methodology for making payments, and no retiree was guaranteed any particular amount, or any payment at all. (Municipal Code 3.36.580(d)(5).) This Council discretion to establish payment methodology indicates that the City did not intend to suspend legislative control over the SRBR and prevents the creation of a vested property right. *Doyle*, 606 F.3d at 675-76 ("Thus, a statute does not create a property right if it allows the decision making body discretion to add an additional criterion . . . , or to define its own criteria"); *Claypool*, 4 Cal.App.4th at 670 ("implication of suspension of legislative control must be 'unmistakable'" for a vested-right finding). For these reasons, plaintiffs have not shown a vested right to continuation of the SRBR.

3. Even If The Funding Of Or Distribution From The SRBR Is A Vested Right, The Doctrine Does Not Recognize Rights That Result In Unintended Consequences That Defeat The Purpose Of The Benefit.

Even if the Municipal Code did create vested rights in the SRBR, the City demonstrated at trial that Measure B remedies the "unforeseen advantages and burdens" of the SRBR – which siphoned funds from the retirement funds into the SRBR when the plan was not fully funded.

Allen v. Bd. of Admin. of the Public Employees Ret. Sys., 34 Cal.3d 114, 119-24 (1983) ("Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract"); *Walsh*, supra, 4 Cal.App.4th at p. 697 ("the impairment provision does not prevent laws which restrict a party to the gains `reasonably to be expected from the contract. Constitutional decisions `have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.")

The original purpose of the SRBR was for retirees to share in the fruits of a successful retirement fund, but it now has the unintended effect of taking funds from the trust at a time when the plans are grossly underfunded, thus increasing the City's contribution rate, and requiring cuts in services to the public and layoffs of City employees.

We are informed that the Superior Court in San Francisco, which is addressing a similar supplemental benefit contained in the City and County of San Francisco's pension plan, has ruled in favor of San Francisco on this issue. The ruling and the City's proposed statement of decision are attached as Exh. L and we will provided when a final decision is issued.

In *Allen*, a 1947 law pegged legislators' pension COLAs to the pay of current legislators; a 1966 law removed that link and instead imposed a COLA based on CPI. The Court held that the 1947 law had resulted in "unforeseen advantages" when the 1966 law greatly increased legislators pay beyond all prior expectations. *Allen*, 34 Cal.3d at 124-25. In the order on the City's motion for summary adjudication, the Court distinguished *Allen* from this case based on *Allen's* reference to "the constitutional revision of 1966 which expressly negated such expectations" of a vested right. (Order at p. 6.) But in *Allen,* it was not the *1966 revision* that created the vested right; it was the earlier 1947 law which had given the legislators a pension pegged to the salaries of active legislators. *Id* at 122, 124-26. In *Allen*, the 1966 revision eliminated pegging the pension to actives' salaries. *Id.* Here, the comparable provision to the 1966 revision in *Allen* is Measure B, which confines "retirement beneficiaries to those gains reasonably to be anticipated from their employment contract." *Id.* at 125.

The trial evidence demonstrated that the original purpose of the SRBR, and the parties reasonable expectations, were that distributions would be made from a successful fund – certainly not a fund with billions in unfunded liabilities. See *Walsh* at p. 703 ("whatever the wisdom" of the benefit in an earlier era "the measure did not serve, and was contrary to, the purposes of a public pension system [in later years].)

- When the City created the Federated (1986)and Police and Fire (2001) SRBR reserves, the funds were fully funded . (Exh. 5700 [1986 Federated projections]; Exh. 5719 [reporting to membership that added benefits were "due to the very successful investment record of the Retirement Board]; Exh. 6030 [Police and Fire charts].)
- The original memos, which are attached to this brief as Exhibit K, concerning the Federated SRBR, issued by the Retirement Board and the City, emphasized that SRBR payments would be made from a healthy fund. (Exh. 5701[4/25/86 Memo from Federated Board to Mayor and City Council, recommending SRBR: "[T]he Board will have the capacity to grant ad hoc adjustments based on the increase in the consumer price index and the *availability of funds in the retirement system.* This means that the retirees will benefit when the money in the fund grows because of *superior investment performance.*"]); Exh 5719 [6/26/86 Memo from Retirement Director to Members of the Federated Employees Retirement System: "When the money grows because *of superior investment performance* of the Federated Retirement Board, the Board can recommend that the Council approve increased benefits."] (Emphasis added.)
- Both the plaintiffs' and the City's actuarial experts agreed that the term "excess earnings," used in the Municipal Code, was misleading because, to the average person, the term implies that it is free. (Tr. p 296 [Lowman], p. 965 [Bartel]. The City's expert John Bartel described the SRBR as a "flawed system in that you pull excess assets out and there is no offsetting amount to go ahead and provide for those … I think other actuaries would describe it as an asymmetric system." (Tr. p. 963.)
- Both experts agreed that the SRBR formula, which they called "skimming" was not free, but rather had a cost, because it removed funds during the years when retirement

system earnings were high, but did not return funds during years in which the systems' had losses. (Tr. p. 286-287 [Lowman], Tr. p. 964, 964-65 [Bartel].) Bartel explained "what happens if you have an investment return in excess of the assumed return, whether you have an unfunded liability or you don't, that excess is pulled off and creates a larger unfunded liability." (Tr. p. 964.)

- Both experts also agreed that, despite the existence of the Federated SRBR since 1986, and the Police and Fire SRBR since 2001, it was not until 2011 that the retirement system actuaries explicitly assigned and subtracted a cost for SRBR. (Tr. p. 290-292 [Lowman], Tr. p. 967-68 [Bartel.] Bartel testified that, although the actuaries initially estimated a cost for SRBR, there is no evidence in the actuarial reports, until 2011, that any cost was actually subtracted (Tr. p. -967-968, 971-72.)

The fact that the actuaries did not historically factor in the cost of the SRBR is significant. In *Walsh*, the Court noted that the benefit at issue there was "not subjected to comprehensive planning" and therefore "peculiarly susceptible to the possibility of conferring unwarranted windfall benefits to its members and of creating an unreasonable drain on the public fisc." *Walsh*, 4 Cal.App.4th at p. 702. The same is true here – there was no planning to compensate for the SRBR's "drain on the public fisc."

On this issue, Plaintiffs offered no evidence and did not rebut the City's evidence. Accordingly, with the City's evidence not contradicted, the Court must find for the City.

4. Plaintiffs Have Not Sought Damages And Public Policy Militates Against Any Requirement That The SRBR Funds Be Removed From The General Retirement Funds

In early 2013, the City enacted ordinances that returned the SRBR funds to the general retirement funds. *See Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1068, 1119 (2004) (because "a statute, once enacted, is presumed to be constitutional until it has been judicially determined to be unconstitutional," a local executive official does not have "the authority to disregard the terms of the statute in the absence of a judicial determination that it is unconstitutional…"). As a result, the retirement funds' unfunded liabilities were greatly reduced and the City was able to reduce its yearly contribution for employee pensions. (Tr. p. 603) The

City has used those funds to restore City services and offer modest salary increases to its employees. (Tr. 607.)

No complaint seeks monetary relief on behalf of retirees for SRBR payments not made over the last four years. Nor did any plaintiff provide evidence that any plaintiff has filed a tort claim with the City in connection with the suspension of SRBR between 2010 and 2013. Therefore, any claim for monetary relief is barred in connection with the City's suspension of SRBR in those years. *Dalton v. East Bay Mun. Utility Dist.*, 18 Cal.App.4th 1566, 1568, 1574 (1993); *Sappington v. Orange Unified School Dist.*, 119 Cal.App.4th 949, 955-956 (2004). Accordingly, Plaintiffs have no legal right to obtain any past SRBR distributions.

Moreover, only the Retirees specifically ask the Court to order the SRBR funds returned to the SRBR reserve. But the Court should not do so under important public policy principles. An analogous situation was presented in *Green v. Obledo*, 29 Cal.3d 126, 142 (1981), which involved past welfare payments, but the reasoning applies here in connection with restoration of payments to the SRBR reserve:

> In distinction to a suit brought by an individual claimant for his own account, an action by an entire class to recover past welfare benefits withheld pursuant to an invalid regulation or statute might impose, in some circumstances, a disproportionate clerical and financial burden on the governmental entity if such benefits were ordered paid for the entire period of limitations. This could occur, for example, if the regulation or statute had been in force for a number of years at the time of the judgment, if the class were particularly large, or if the potential individual recovery of each class member were small. Accordingly, on such a showing the trial court, acting as a court of equity, has discretion to fix a more realistic starting date for the payment of retroactive benefits to class members

Here, should the Court rule against the City, the court has discretion to determine a "realistic starting date" for any resumption of the annual deposit of funds into the SRBR reserve. Funds have not been distributed for a number of years, any individual payment from the funds would be discretionary in amount, and any transfer of funds back to the SRBR reserve would create a financial hardship on the City. It would eliminate the savings that have permitted the City to restore some services and potentially provide salary increases to the workforce.

Section 1512-A(a)

I. Section 1512-A (a): Retiree Healthcare. Minimum Contributions

Much of plaintiffs' case at trial was devoted to retiree healthcare. Here again, they failed to meet their burden of proof.

Section 1512-A(a) provides that all employees "must contribute at least half of the cost of retiree healthcare, both normal cost and unfunded liabilities." Plaintiffs claim that they have a vested right to the City paying for all unfunded liabilities for retiree healthcare. But they cannot meet their burden of showing "clear" and "unmistakable" evidence of any such promise by the City. *REAOC*, 52 Cal. 4th at 1186. With respect to section 1512-A(a), the evidence at trial showed unequivocally that Measure B simply moved the existing "one to one" funding ratio from the Municipal Code into the Charter, and there could not possibly be a vested right implicated.

First, even before the enactment of Measure B, in both retirement plans, the Municipal Code required that employees make contributions in a one to one ratio and contained no requirement that the City pay for unfunded liabilities. These Municipal Code sections are attached as Exh. M. [27]

MEASURE B	PRE MEASURE B
Charter Section 1512-A: (a) Minimum Contributions. Existing and new employees must contribute a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.	**Federated Plan, Municipal Code 3.28.385(C)** Contributions for other medical benefits **shall be made by the city and the members in the ratio of one-to-one.** **Police and Fire Plan, Municipal Code 3.36.575(D)** Contributions for other benefits provided through the medical benefits account **shall be made by the city and the members in the ratio of one-to-one.**

Second, the City has *never* paid for all unfunded liabilities. Since the mid-1980's, when the retiree healthcare benefit was introduced, the City and employees have paid contributions to

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[27] AFSCME has argued that the Charter and Municipal Code sections on contribution rates for pension obligations apply here. That is clearly wrong based on both the text of the Code and the practices of the Retirement Board and the parties.

the retirement systems to fund the benefit on ratio or 50-50 or one to one. (Tr. p. 788 [Gurza]), Initially, the payments constituted "partial pre-funding," not full prefunding of the benefits. (Tr. pp. 793-794, 853-54. [Gurza], Exh. 5502 at p. 000630 [2007 actuarial report].) Actuarial expert Thomas Lowman, identified as an expert by both the POA and the Sapien plaintiffs, confirmed that historically the City and employees had each paid half of the costs of retiree healthcare, first in an amount calculated to pay costs over ten or more years, and more recently an amount that covered both normal cost and unfunded liabilities. (Tr. p. 247-48.) He admitted that the City has never paid any additional amounts designated for unfunded liabilities. (Tr. p. 276, 278.)

Third, at trial, the City showed that since 2009, after GASB required public employers to report all retiree healthcare unfunded liabilities, almost all City unions agreed to a "ramp up" in the contribution rates until the City and the employees each pay 50% of the full ARC. (Tr. pp. 790-795, Exhs. 5501 [actuarial reports re GASB], 5503 [City memo re GASB], 5504-5507 [Terms of agreements].) All Federated unions and the City recently renewed these agreements, providing for a longer "ramp up" period before both sides will be paying half of the full ARC. (Tr. pp. 796-798, Exh. 5508.) The City has stipulated that it will honor these union agreements. (Tr. p. 949-950, Exh. 5107.) The most recent agreement is attached hereto as Exh. N.

Plaintiffs' claims with respect to Measure B, section 1512-A, hinge on whether they can prove that the City made an irrevocable commitment to pay all unfunded liabilities for retiree healthcare. Plaintiffs have not met this burden.

First, there has never been an express commitment by the City to pay all unfunded liabilities for retiree healthcare. The Municipal Code states only that employees and the City shall pay for retiree healthcare in a ratio of one to one and is silent as to unfunded liabilities. (Municipal Code §§ 3.28.385(C), 3.36.575(D).)

Second, plaintiffs cannot show some "implied" vested contract commitment to pay unfunded liabilities in perpetuity. As explained above, under *REAOC* those seeking to enforce an alleged vested right face a "heavy burden" to overcome the presumption against vesting. *REAOC,* 52 Cal.4th at 1186-87, 1190. Here, the record shows just the opposite of an intent to treat payment of unfunded liabilities as a vested benefit because *all parties treated the issue as subject to change*

and fully negotiable. In fact, the labor unions and the City have all negotiated and agreed in MOAs that their members would make increased payments with the goal of paying 100% of the ARC at the ratio of one-to-one with the City.

This issue is governed by the decisions *in San Bernardino Public Employees Ass'n v. City of Fontana*, 67 Cal.App.4th at 1223-26, which held that unions could not bargain, and make an agreement, over an item then later claim that the item was vested, and *City of San Diego v. Haas*, 207 Cal.App.4th 472, 495 (2012), which held that "vested rights may not be implied … where, as here, they are contrary to express terms of the parties' contract."

The POA does not contest Section 1512-A(a) on its face, but rather claims that it violates the POA's MOA with the City, which contains a 10% cap on employee payments towards retiree healthcare contributions. The POA cannot prove this claim because in a stipulation signed by all parties, and approved by the Court, the City agreed that agreements on retiree healthcare contributions would be honored. The Stipulation reads: "The effective date for implementation of Section 1512-A (a) (minimum contributions towards the cost of retiree healthcare) shall occur no sooner than January 1, 2014, except that contributions towards retiree healthcare shall be subject to any existing or future union agreements, or City resolutions, authorized prior to January 1, 2014, that specify employee contributions towards retiree healthcare." (Exh. 5107.)

As with other claims, Plaintiffs offered no contrary evidence at trial and did not prove this claim.

Section 1512-A(b)

J. Section 1512-A (b): Retiree Healthcare. Vested Rights

This section states that "no retiree healthcare plan or benefit shall grant any vested right, as the City retains its power to amend, change or terminate any provision." This section does not change the status quo, but rather (1) reflects what vested rights currently exist, since it does not propose to take them away, and (2) declares an intent not to create any new vested rights.

Plaintiffs have speculated that the City would use this section to take away vested rights to retirement benefits. But they did not introduce any evidence on this issue and thus bring only a facial challenge. Accordingly, they cannot prove that there is no application of this section that would be legal, and therefore they cannot prove their case. *Tobe*, 9 Cal. 4th at 1102. Moreover, until the City applies this section in a manner that infringes on vested rights, it is not ripe for adjudication. *Fontana*, 67 Cal.App.4th at 1226, *Pacific Legal Foundation*, 33 Cal.3d at 170.

Section 1512-A(c)

K. Section 1512-A (c): Retiree Healthcare, Low Cost Plan

Plaintiffs' devoted much of their trial time to challenging this section of Measure B. As with Section 1512-A(a), their challenge must fail because the practice of tying a subsidy to the lowest cost plan pre-existed Measure B and there could be no possible vested right at issue.

Under the Municipal Code, the City has subsidized retiree healthcare benefits in the amount of the premium for the "lowest cost plan" offered to active City employees. (The Municipal Code sections are attached as Exhibit N hereto. The City demonstrated at trial that Measure B Section 1512-A(c) simply continues that practice, defining "low cost plan" as "the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement System."

MEASURE B	PRE MEASURE B
Section 1512-A: (c) Low Cost Plan. For purposes of retiree healthcare benefits, "low cost plan" shall be defined as the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement System.	**Federated Plan, Municipal Code 3.28.1980B(1):** The portion of the premium to be paid from the medical benefits account, or trust fund established by Chapter 3.52, shall be the portion that represents an amount equivalent to **the lowest of the premiums for single or family medical insurance coverage**, for which the member or survivor is eligible and in which the member or survivor enrolls under the provisions of this part, **which is available to an employee of the city** at such time as said premium is due and owing. **Police and Fire Plan, Municipal Code 3.36.1930D** For the purposes of this section, "lowest cost medical plan" means that medical plan (single or family coverage as applicable to the coverage selected by the member, former member or survivor): 1. Which is an eligible medical plan as defined in Section 3.36.1940; and 2. Which has the **lowest monthly premium of all eligible medical plans then in effect**, determined as of the time the premium is due and owing.

The POA contends that this provision of Measure B violates its vested rights because POA retirees are entitled to the "lowest cost plan" provided to active police officers, not to any city employees. But the Municipal Code did not contain this distinction. Under Municipal Code

section 3.36.1930D, "'lowest cost medical plan' means that medical plan . . . [w]hich is an eligible medical plan as defined in Section 3.36.1940" and [w]hich has the lowest monthly premium of all eligible medical plans then in effect." Under section 3.36.1940 an eligible medical plan is one "with which the city has entered into a contract for the provision of hospital, medical, surgical and related benefits as part of the city's benefits to city employees." AFSCME appears to contend that its retirees have the right to a particular "lowest cost medical plan" and that the plan cannot be changed, but the Municipal Code never promised a particular plan design.

City's Evidence. At trial, Alex Gurza explained that the City had consistently tied the retiree subsidy to the "lowest cost plan" available to any active City employee, not to the plan available to a particular bargaining unit. (Tr. p. 801-804.) The "benefits fact sheets" issued by the Retirement System describe the retiree subsidy as the "lowest cost plan available to an active employee." (Exh. 5509.) Both Mr. Gurza and City Manager Figone also testified that the City had periodically changed the plan design of the "lowest cost plan." (Tr. 801, 810.) Moreover, City Manager Figone and Mr. Garza both confirmed that the City's decision to change the plan design for the "lowest cost plan" was made through the Municipal Code, was planned prior to the enactment of Measure B and "regardless of Measure B, the City would have brought forward a new lower price plan to lower costs." (Tr. p. 619, 622, 804, 810.)

Plaintiffs' Evidence. The POA introduced two benefits booklets from 1995 and 1997 (POA Exhs. 7, 8) which stated that retirees would "pay a portion of the premiums equal to the amount paid by City employees in the same position you held at the time of your retirement. [SJMC 3.36.1930]" But these booklets predated the current ordinance, which was enacted to implement an arbitration decision that defined the lowest priced plan as the plan "available to active employees."(POA Exhs. 9, 48, 49 [all referring to "active employees"])

The POA also introduced Retirement Plan actuarial reports, dated 2007-2010, which stated retirees were entitled to payment "of 100% of the lowest priced medical insurance plan available to an active police and fire employees." (Exhs. 15-18, 23.) This statement is at best ambiguous, because it is contained in a police and fire retirement system report. But in any event, each booklet states it is provided for general information, or financial reporting, purposes only and:

"Employees and members should refer to the City of San Jose Municipal Code for more information."

Plaintiffs' *witnesses* on this issue did not cite to any document that gave them the right to the "lowest cost plan" available to active police officers as opposed to active City employees in general. Mike Fehr, who retired in 2005, testified that based on an exit interview, he assumed he would continue to have the same plan he had as active police officer at the same price. (Tr. p. 75.) But on cross examination, he admitted that his premiums had gone up almost every year, and that no one from the City told him that his benefit would be tied to "lowest cost plan" for active police officers as opposed for active City employees. (Tr. at p. 92-93.)

John Robb, a current POA member, also did not identify any particular City document, testifying only that he assumed the reference to "active employee" in the benefits fact sheets related to a police officer or firefighter, since the benefits fact sheets were issued by the Police and Fire Plan. (Tr. 146, 247.)

Pete Salvi, another POA retiree testified only that his premiums had risen, but also did not identify any statements by the City. (Tr. 201.) And neither Salvi, nor AFSCME witness Margaret Martinez knew whether or not Measure B had caused an increase in their premiums. (Tr. 210, 333.)

Plaintiffs claim that the 2008 memo issued by City Manager Debra Figone (POA Exh. 51) is a City admission that the "lowest cost plan" in existence in 2012 was a vested right. The memo says no such thing. The memo's statement that "the retiree health care benefit can be considered a vested benefit similar to the pension benefit itself" did not relate to any particular medical plan. (Tr. p. 610) Rather, it related to the fact that the City would continue to subsidize retiree medical premiums in the amount of the premium for the "lowest cost plan" for active employees – and was not tied to any particular "plan design." (*Id.*) In fact, the memo mentioned changes in "plan design" as an option. As explained by the City Manager at trial, "we knew we would have to explore lowering costs, and plan design was one way that appeared to use most viable." (Tr. p. 611.) Again, the memo did not, and did not purport to, alter the Municipal Code definitions of "lowest price plan."

Legal Analysis. Plaintiffs are contending that the Municipal Code provision on "lowest cost plan" contains an implied term that required the City to offer police retirees the "lowest cost plan" available to police officers, or that prevented the City from altering the lowest cost health benefit plan. But this argument fails under *REAOC*, because plaintiffs cannot provide any "clear" and "unmistakable" evidence of implied term. Plaintiffs claim a course of conduct – that is, in the past the City offered a different "lowest cost plan" that resulted in a higher subsidy for retirees. But this very argument was rejected in *Sappington,* 119 Cal.App.4th at 949, 953, which rejected a claim by retirees that they had a vested right to a free employer paid PPO plan because the District's 20 year "practice" was to subsidize the higher cost PPO plan.

As explained in *Sappington*: "The fact that the District provided a free PPO benefit for 20 years – before health insurance premiums skyrocketed and the cost of PPO coverage began far outpacing the cost of HMO coverage – does not prove the District promised to provide that option forever." *Sappington*, 119 Cal.App.4th at 955.

On remand, the federal district court ruling in *REAOC* confirmed this principle, rejecting the claim by Orange County retirees that "the County's 23-year practice of annually authorizing this generous [subsidization] policy morphed into an implied contract requiring the County to guarantee this benefit for life." *REAOC*, 2012 U.S. Dist. LEXIS 146637, **1, 37 (C.D. Cal. 2012). The Court concluded that the retirees were asking the county "to pay for a promise that it never made: to continue using a favorable 'pooling' methodology to calculate the health care premiums of its retired employees." *Id.* Absent authorizing legislation, past practice does not create an "implied contract" giving rise to vested rights.

Plaintiffs raise the specter that the City could offer a "lowest cost plan" of so little value that it would eviscerate any benefit to the retirees. But there was no testimony that the City had done so or intended to do so, making this claim completely speculative. Moreover, this same issue theoretically existed under the Municipal Code, which predated Measure B.

For these reasons, Plaintiffs have not met their burden of proof on this issue.

Section 1513-A

L. Section 1513-A: Actuarial Soundness (for both Pension and Retiree Healthcare Plans)

Section 1513-A(c) requires that pension plans be actuarially sound, minimize risks to the City and its residents, and be prudent and reasonable in light of economic climate, among other things. Plaintiffs complain that this section violates the state Pension Protection Act because it requires the retirement boards to consider the interest of "taxpayers with respect to the costs of the plans" (Section 1513-A(c)(ii).) They contend that the Pension Protection Act requires retirement boards to keep paramount the interests of retirees and beneficiaries.

The City introduced ordinances that state unequivocally that this section shall be interpreted consistently with the Pension Protection Act, and that in the event of conflict, the Act would control. (Exhibits 5300, 5301.) Key sections are included in Exhibit O attached hereto. Thus, there is no possible way plaintiffs could show that this section inevitably poses a "present total and fatal conflict" with the Constitution. *Tobe,* 9 Cal. 4th at 1084. Again, it is undisputed that the City has interpreted it consistently with the Constitution. On this ground alone, the plaintiffs' claim should be rejected.

Further, the claim is not ripe because, unless and until the City implements section 1513-A in some manner that violates the Constitution, there is no controversy to resolve. Fontana, 67 Cal.App. 4th at p. 1226; *Pacific Legal Foundation*, 33 Cal.3d at 170, 173.

Section 1515-A

M. Section 1515-A: Severability

Section 1515-A provides a general severability clause which provides that if "any ordinance adopted" pursuant to Measure B is held "invalid, unconstitutional or otherwise unenforceable by a final judgment, the matter shall be referred to the City Council for determination as to whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective."

Plaintiffs contend that this section violates the separation of powers doctrine because it is the role of the courts, not the City Council, to determine whether "the section is severable and ineffective." But they have not met their burden given that Section 1515-A is consistent with the common practice of letting government defendants exercise discretion in complying with judgments. *Common Cause v. Board of Supervisors*, 49 Cal.3d 432, 445-46 (1989) ("although a court may issue a writ of mandate requiring legislative or executive action to conform to the law, it may not substitute its discretion for that of legislative or executive bodies in matters committed to the discretion of those branches").

Moreover, plaintiffs have not shown that this claim is ripe. There is currently no "ordinance adopted" pursuant to Measure B that is the subject of this litigation, or that has been held invalid, unconstitutional, or unenforceable. As such, there is no concrete issue to be decided. Fontana, 67 Cal.App. 4th at 1226; *Pacific Legal Foundation*, 33 Cal.3d at 170, 173.

The case cited by the POA in its trial brief, *Mandel v. Myers*, 29 Cal.3d 531 (1981), is completely inapposite as it involved the states refusal to pay court ordered attorney's fees. Here, there has been no court order and no refusal to honor it.

Other Claims

N. Plaintiffs' Collateral Theories Must All Be Rejected

Certain plaintiffs advanced two remaining claims at trial: AFSCME made a claim for "equitable estoppel," and both AFSCME and the SJPOA made a claim based on the Bane Act. Neither claim was proven.

1. AFSCME Did Not Prove Its Claim For Equitable Estoppel

To prove equitable estoppel, AFSCME "must prove (1) a representation or concealment of material facts (2) made with knowledge, actual or virtual, of the true facts (3) to a party ignorant, actually and permissibly, of the truth (4) with the intention, actual or virtual, that the latter act upon it and (5) that the party actually was induced to act upon it." *Walsh*, 4 Cal.App.4th at 709. "[I]n order for reliance upon a representation to support an estoppel, the reliance must be justified, that is, the party asserting the estoppel must show that he was actually and permissibly ignorant of the true facts." *Id.* at 710. But estoppel will not lie to contravene any statutory or constitutional limitations. *Medina v. Board of Retirement*, 112 Cal.App.4th 864, 869 (2013).

AFSCME did not meet this burden. First, if AFSCME is relying on statements made outside City ordinances, promissory estoppel will not apply, because in San Jose, the Charter requires that retirement plans must be enacted by ordinance. City Charter Section 1500; *San Diego City Firefighters, Local 145 v. Bd. of Admin. of San Diego City Emples. Ret. Sys.*, 206 Cal.App.4th 594, 610-11 (2012) ("When there has been no compliance with the relevant charter provision, the city may not be liable in quasi-contract and will not be estopped to deny the validity of the contract."). Similarly, there is no viable claim for estoppel when the agency that makes the statement has no authority to grant the benefits promised. *Medina*, 112 Cal.App.4th at 870-71. ("Here, respondents cannot be estopped from reclassifying appellants as general members, because they did not possess the authority to continue to classify appellants as safety members after they became district attorneys even though they appeared to be doing so.") Here, plaintiffs did not offer any evidence that the City departments that issued the booklets had any authority to enlarge City retirement benefits.

But, in any event, AFSCME did not prove the basic elements of estoppel. As explained earlier, the benefits booklets and other materials paraphrased or referred back to the Municipal

Code and did not contain misrepresentations. *San Diego Firefighters*, 34 Cal. 3d 292 at 305 ("Finding no misrepresentation of defendants' retirement plan in the handbook issued to the safety members, we have no occasion to consider whether the remaining elements necessary to raise an estoppel were present here.") And the testimony of AFSCME's witness did not prove that any of them, or anyone else, relied on these publications to their detriment.

Rhoades (AFSCME) testified that he took a City job as an accountant because of the City's pension benefits. But in fact Rhoades initially obtained a job with San Jose through a temp agency, and he could not cite to any other job with better pay, or with better benefits, that he had been offered and rejected in preference for his City job. (Tr. p. 1114-18.)

Margaret Martinez testified that she thought the 2008 Figone memo meant retiree healthcare benefits would not change, but she did not claim to have continued employment, given up more lucrative employment, based on the memo. (Tr. p. 322-33.)

Bob Leininger, a retiree, testified only that he received POA exhibit 15, a 2005 retiree newsletter, but did not testify to any reliance on that or any other City newsletter. (Tr. p. 1009-1010.)

As explained in *San Diego Firefighters*, even if the handbooks were not accurate: "Here, there is no proof that anyone has actually been hurt by the handbook's statement — that any employee has accepted employment or remained on the job in reliance on the misleading answer. The terms of the pension law are prescribed by the City's charter. Without some substantial showing of actual harm, it would be ludicrous if carefully crafted pension legislation could be effectively amended by a bureaucrat's somewhat inept attempt at summarization." 34 Cal.3d at p. 306, Kaus, J. (concurring).

For these same reasons, AFSCME cannot prove its claim for promissory estoppel.

2. AFSCME And SJPOA Have Not Proven Their Claim For Violation Of The Bane Act

AFSCME and the SJPOA's constitutional causes of action each include a violation of California Civil Code section 52.1 ("Section 52.1" or "Bane Act"), purely as a vehicle to "seek redress in the Superior Court for violation of constitutional rights." (SJPOA Complaint, ¶ 73, n. 3;

see AFSCME FAC, page 18, n. 3.) They offered no evidence at trial on this issue and cannot prove these claims.

First, AFSCME and SJPOA do not have standing. Section 52.1 "is limited to plaintiffs who themselves have been the subject of violence or threats." *Bay Area Rapid Transit Dist. v. Superior Court*, 38 Cal.App.4th 141, 142, 144 (1995). There is no statutory authority or precedent for conferring associational standing for Section 52.1 claims.

Second, a constitutional violation on its own – without the requisite threat, intimidation, or coercion – does not implicate Section 52.1. *Shoyoye v. County of Los Angeles*, 203 Cal.App.4th 947, 957, 959 (2012) ("in pursuing relief for those constitutional violations under section 52.1," plaintiffs must allege the acts "were accompanied by the requisite threats, intimidation, or coercion").

Here, plaintiffs offered no testimony of threats or intimidation, rather they assert the theoretical existence of "coercion" related to the choice between pension plans. Even if true, this would be economic coercion, which is not the egregious "coercion" contemplated by Section 52.1. *Schulte v. City of Sacramento* (Case No. NO. CIV. S-05-1812 FCD) 2006 U.S. Dist. LEXIS 4971, *15 n. 7 (February 9, 2006) (declining to "broaden the scope" of Section 52.1 to include "economic coercion" claims); *City and County of San Francisco v. Ballard*, 136 Cal.App.4th 381, 408 (2006) (where plaintiff alleged City coerced him by threatening to impose $15 million in penalties and "partial demolition" of his building if he did not perform "unrequired construction," court found he had "not alleged and the record does not establish any conduct that rises to the level of a threat of violence or coercion" under Section 52.1).

V. CONCLUSION

Upon a close and methodical examination of Measure B, the Court will conclude that the Act is lawful, and that plaintiffs' claims are meritless. As the Act is fully severable, each section must be considered individually. Each section must be upheld in its entirety.

DATED: September 10, 2013 Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____
Arthur A. Hartinger
Attorneys for Defendant/Cross-Plaintiff City Of San Jose And Defendant Debra Figone

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On September 10, 2013, I served true copies of the following documents described as **POST TRIAL BRIEF OF DEFENDANT/CROSS-PLAINTIFF CITY OF SAN JOSE AND DEFENDANT DEBRA FIGONE** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address kthomas@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 10, 2013, at Oakland, California.

Kathy Thomas

SERVICE LIST

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